Deploying Accountability:

The Strategic Use of the Anti-Impunity Norm in Internal Conflicts

in Côte d'Ivoire and Mali

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Abstract

This thesis explores a puzzling phenomenon that has emerged from the recent turn towards pursuing criminal justice for grave abuses in the midst of internal conflict. Despite the rise of the anti-impunity norm as a sovereignty-constraining force, governments proactively engage with the norm, even during internal conflicts in which their very legitimacy is in jeopardy. How and why does the usage, or 'deployment,' of the anti-impunity norm by elite actors influence the political dynamics of internal armed conflicts? This thesis answers this question through case study analysis of the conflicts in Côte d'Ivoire and Mali, in which governments implemented anti-impunity measures nationally and invited the International Criminal Court to investigate in their countries. It argues that national authorities in both countries used the anti-impunity norm as a resource to further the government's short-term political objectives in its legitimation strategy in the context of internal conflict. This was achieved through norm exploitation, a concept coined in this thesis, or how actors can draw benefits from the norm's specific enforcement features and functions in order to further a given objective. Capitalising on the state's centrality within the norm's enforcement, officials strategically deployed measures that both supported and undermined the imperative to prosecute grave abuses in order to favour certain narratives over others and to help shape power relations between parties. This thesis offers a novel lens through which to understand the relationship between the anti-impunity norm and government legitimation in the midst of internal conflict.

To Gaëtan Mootoo,

legendary human rights researcher

Acknowledgements

This research project began on its own, without telling me. In early December 2011, several years before I even considered the prospect of a doctorate, I was interning in the Office of the Prosecutor at the International Criminal Court when former president of Côte d'Ivoire Laurent Gbagbo was swiftly transferred to the ICC. I watched from the Court's public gallery as Gbagbo expressed both his surprise at having been sent to The Hague – on the same official plane he had used as president – and his resignation that his predicament was yet another episode in his life's work of resisting French interference in his country's affairs. Little did I know that I would find myself several years later in Gbagbo's residence in Abidjan, interviewing his son and asking about those final days prior to Gbagbo's unexpected transfer to The Hague.

This present dissertation grew from the question I asked myself in that public gallery: how did this former head of state, who seemed more like a mild-mannered grandfather than a ruthless international criminal, end up in The Hague? My interest in the politics of international criminal justice developed as I later worked for Amnesty International on the Democratic Republic of Congo, where I wrestled with the question underlying this project: what does the emergence of the global governance of criminal accountability for international crimes actually mean in practice?

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Abstract

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Chapter 1: Introduction

"This is a fundamental break with history. The old era of impunity is over. In its place, slowly but surely, we are witnessing the birth of a new 'age of accountability.'"

- Former UN Secretary-General Ban Ki-Moon[1]

"Where accountability was once the rare exception, it is increasingly a strongly held expectation; today, it is the absence of accountability initiatives—such as with respect to on-going atrocities in Syria— that garners attention. We are, in many ways, witnessing the dawn of a new era of accountability and respect for the rule of law."

- Judge Theodor Meron[2]

The Problématique

This thesis examines a particular puzzle. Since World War II, a new norm has emerged linking the fields of international relations and international law: the anti-impunity norm. Stemming from the relatively recent turn to criminal law within human rights advocacy, the anti-impunity norm refers to the idea that individuals who commit the most egregious human rights abuses must be held criminally accountable through investigation, prosecution, and punishment. Fuelled especially by outrage at the massive human suffering that the world witnessed during World War II, apartheid in South Africa, and the ethnic cleansing in Rwanda and the former Yugoslavia, this normative shift views past treatments of such abuses, ranging from general impunity to executions or summary trials of perpetrators, as no longer acceptable.

Though the phrase 'ending impunity' has only been widely used in English since 1986, it has become a central feature of current conceptions of international justice and is now "one

[1] United Nations Secretary-General Ban Ki-moon 2010.
[2] Meron 2016, 7.

of the unique ethical signatures of our time."[3] The adoption of new treaties and legal standards, the creation of new domestic, regional, and international institutions, and the increase in human rights trials relating to individual criminal accountability for these crimes, driven particularly by transnational networks of human rights activists, constitute a "justice cascade"[4] that has led to the view that ending impunity is now "a legal, political, and pragmatic imperative."[5] This thesis explores the intriguing phenomenon of the recent increase in state engagement with the anti-impunity norm, particularly in the politically volatile contexts of internal armed conflicts. This phenomenon is indeed puzzling in light of the norm's emergence as a move to limit and constrain sovereignty and the pursuit of politics as usual. To shed new light on this puzzle, this thesis explores how and why does the usage, or 'deployment,' of the anti-impunity norm by elite actors influence the political dynamics of countries affected by internal conflict.

Before further presenting the puzzle and the research question at the heart of this thesis, it is important to identify the key elements of the anti-impunity norm. The anti-impunity norm as defined here is very similar, though not entirely the same, to what other scholars refer to as "the global accountability norm,"[6] "the new justice norm,"[7] "international justice norms,"[8] "the nonimpunity norm,"[9] the "impunity norm,"[10] the transitional justice norm,"[11] the "anti-impunity norms,"[12] the "international criminal law norms,"[13] and "norms against international criminal law impunity."[14] First, it is not generally applicable to all human rights violations and transgressions under international law, but rather pertains to accountability for a specific set of human rights violations - war crimes, crimes against humanity, and genocide - that are "characterized by the directness and gravity of their assault upon the human person, both corporeal and spiritual."[15] So grave that they cannot be deemed legitimate acts of state, these acts have been deemed particularly shocking by the international community and are thus of

[3] Moyn 2017, 69.
[4] Sikkink 2011.
[5] Engle, Miller, and Davis 2017, 3.
[6] Mallinder 2012.
[7] Sikkink 2011, 13.
[8] Rodman 2019, 18.
[9] Bower 2019.
[10] Pensky 2016.
[11] Subotić 2009.
[12] Rodman 2019, 15.
[13] Simmons and Jo 2019, 18.
[14] Simmons and Jo 2019, 23.
[15] Ratner, Abrams, and Bischoff 2009, 14.

international concern. Second, stemming from the shift from states to individuals as the primary subjects of international criminal law, these human rights violations must be treated as crimes committed by individuals. Importantly, reflecting the notion that standards should be universal and that all individuals should be treated equally, individuals are to be held accountable regardless of their status or any other characteristics. Third, the anti-impunity norm calls for a particular type of accountability: criminal accountability. The appropriate mechanism for addressing the responsibility for alleged acts of atrocity is regularised criminal proceedings, reflecting the importance of the protection of the rights of the accused.[16] By "impunity," this thesis thus refers to the situation in which an individual is exempt from the criminal legal process, and punishment if warranted, that is normally due for the act the individual allegedly committed.[17] Linking these second and third elements, the impunity enjoyed by a given individual perpetrator is a violation of the equality of individuals, as that individual is treated preferentially compared to other persons and other circumstances. Fourth, as elaborated in Chapter 2, the anti-impunity norm, as conceptualised in this thesis, can be understood as a political expectation, based on extensive though not comprehensive legal obligations, that states must take measures to hold alleged perpetrators criminally accountable for grave abuses in domestic jurisdictions and, when unable or unwilling, cooperate with investigations and prosecutions in international criminal courts. The norm is enforced through a decentralized but interconnected system of accountability mechanisms, primarily through domestic courts with international courts as backup subsidiary institutions.[18]

This thesis thus focuses on the particular visions of accountability and justice that form part of the prescriptive aspect of the anti-impunity norm and constitute only one dimension of a larger shift in ideas of addressing human rights violations. If accountability is understood as

[16] Sikkink 2011: 13; Bower 2019, 90; Drumbl 2007; Mégret 2017

[17] This definition is slightly different than the definition that appears in *The United Nations Principles to Combat Impunity,* in which impunity refers to "the impossibility, de jure or de facto, of bringing the perpetrators of violations to account—whether in criminal, civil, administrative or disciplinary proceedings—since they are not subject to any inquiry that might lead to their being accused, arrested, tried and, if found guilty, sentenced to appropriate penalties, and to making reparations to their victims." (Krahenhann 2018, 34) The anti-impunity norm is not necessarily against the *impossibility* of bringing perpetrators to account due to the absence of inquiries but rather, more precisely, *for* holding perpetrators to account through criminal proceedings and thus *against* the non-occurrence of investigations and, if warranted, prosecution and punishment and the enjoyment by the perpetrators of the lack of punishment.

[18] Sikkink 2011, 19.

"practices where some actors hold other actors to a set of standards and impose sanctions if these standards are not met,"[19] it can encompass many possible forms of accountability, including political accountability or non-criminal legal accountability. The type of individual and criminal accountability prescribed by the anti-impunity norm is narrower.[20] Similarly, the vision of justice within the "atrocity paradigm" calls for criminal justice to be pursued through both domestic and international courts, and by extension views injustice as a failure to investigate and prosecute.[21] This vision of justice is just one of various conceptions of justice within the field of transitional justice, including restorative justice, reparative justice, "political justice" and "survivor's justice."[22] Indeed, states have increasingly established various judicial and non-judicial mechanisms, including trials but also truth commissions, reparations programmes, state apologies, lustration or vetting measures, and legal reforms. While the adoption of these measures undoubtedly form part of the larger story of how a country deals with past, and sometimes ongoing, abuses, this study's focus on judicial mechanisms enables sharp analysis of one key, and often most controversial, part of the story. For this thesis, the term "anti-impunity norm" is thus more precise than "global accountability norm," "the new justice norm," and "global justice norm" as used by other scholars referring to the same idea.[23] More broadly, the vision of justice within the anti-impunity norm is distinct from other types of global justice, including distributive justice, social justice, gender justice, and environmental

[19] Sikkink and Kim 2013, 270.

[20] This focus on criminal accountability within the definition of the anti-impunity norm used in this thesis is slightly narrower than similar studies. For instance, Subotić explores the norm that war crimes, crimes against humanity, and genocide should be adjudicated in a court of law *or another type of justice institution*," such as a truth commission. Subotić 2009, 15.

[21] Douglas 2016, 44.

[22] Mamdani 2015. See also Nouwen and Werner 2015 for further discussion of the ways in which justice can be defined and understood in conflict-affected contexts.

[23] While the other terms are not necessarily inappropriate, there are additional reasons for choosing the term "anti-impunity norm" over others. Moreso than the prefix "non," the prefix "anti" explicitly evokes the idea that the move away from the traditional impunity model is indeed a struggle and a fight *against* the long-term status quo. Further, several authors, including Rodman and Simmons and Jo, refer to a plurality of norms. For instance, Simmons and Jo identify "core ICL norms" as composed of "individual criminal accountability and no-impunity norm," or the idea that "individuals should be held accountable for egregious human rights violations" and that certain crimes have been identified in international criminal law as "international crimes" (Simmons and Jo 2019, 18). While the anti-impunity norm can indeed be analysed as constituted of various sub-norms (norms including the equality of individuals, the right to life, the right to a fair trial, the right to a fair and effective remedy…), the broad normative imperative can also be understood as a singular idea: that individuals should be held *criminally* accountable for international crimes, namely crimes against humanity, war crimes, and genocide.

justice.[24] While featuring a narrow understanding of accountability and justice, the anti-impunity norm nevertheless represents what some scholars describe as a "revolution in accountability."[25]

As part of the contra-sovereignty *zeitgeist*, the anti-impunity norm is premised on an opposition between politics and law. While 'politics' has been defined in a wide variety of manners, this thesis builds from Koskenniemi's definition of politics as a "matter of furthering subjective desires."[26] 'Politics' can here be understood as a matter of advancing subjective aims, with the objective of benefitting some at the expense of others. The presumed opposition between politics and law expects law to serve as "an instrument for suspending the political."[27] Put differently, law is seen as "hold[ing] out the promise of at least relative neutrality and relative depoliticization – compared with partisan mud-slinging, dirty tricks, and armed conflict."[28] Representing what Hurd deems the "enchanted" view of law, this view assumes the turn to international legal norms and institutions adds desirable aspects such as rationality, procedure, fairness, or accountability to a prior condition that was dominated by power by providing a set of rules to settle disputes and thus promotes international stability and human rights.[29] When viewed as an "an 'autonomous system' of concepts and institutions that may be used to oppose and limit state power,"[30] law is thus deemed as a fight *against* politics or, put differently, anti-political. By extension, the anti-impunity norm is also based in the presumed binary between politics and law, and law's ability to constrain politics. The movement that contributed to the norm's emergence viewed past approaches to international conflicts as having been "unacceptably political."[31] Anti-impunity is deemed as anti-political.[32]

International criminal law is thus deemed in opposition to sovereignty, as sovereignty traditionally enables the pursuit of politics without scrutiny and is used as a shield against condemnation for the commission of human rights abuses based on international law, and

[24] Mégret 2015, 78.
[25] Sriram 2010.
[26] Koskenniemi 1990, 5.
[27] De Hoon 2017, 609.
[28] Luban 2010, 2. See also Simpson 2007, 140.
[29] Hurd 2016, 96-97.
[30] Crawford and Koskenniemi 2012, 4-5. This view reflects Hurd's conception of the enchanted vision of international law.
[31] Koskenniemi 2002, 12.
[32] Ferguson 1994, 255-256 as cited in Miller 2017, 159-160.

action to stop those abuses.[33] Indeed, the incorporation into domestic and international legal regimes of the duty to hold individuals criminally accountable for grave abuses reduces governments' freedom of action.[34] Through a sense of state-based and collective responsibility to ensure criminal justice for international crimes committed *by* individuals *against* individuals, the anti-impunity turn prioritises the individual and thus reflects a move away from, and somewhat above, the state. As developed further in Chapter 2, the substantive norms within the relevant bodies of law, including international human rights law, international humanitarian law, and international criminal law, have the effect of limiting sovereignty by delimiting the legal conduct of states and by imposing a fragmented duty to prosecute abuses. Further, the institutions that have been created as part of the system of international criminal justice limit sovereignty as they "intrude on one of the most sacred areas of state sovereignty: criminal jurisdiction."[35] As one example of such institutions, the International Criminal Court (ICC) - a permanent, independent, and supranational institution with jurisdiction over crimes against humanity, war crimes, genocide, and the crime of aggression - represents in many ways a step away from a state-centric international system and towards the construction of an international constitutional order and a universal community of humankind.[36] Most clearly, the ICC takes away the right of states to decide when and how to conduct investigations and prosecutions.

From an instrumental standpoint, the effort to hold individuals criminally accountable for grave crimes as a sovereignty-constraining force undergirds the idea, promoted by the United Nations, human rights advocates, and scholars, that doing so favours the end of hostilities as the presumed anti-politicality of law is assumed to neutrally regulate and constrain politics. This dovetailing of peace and justice gradually evolved from pursuing criminal accountability for grave crimes after conflict to doing so *during* conflict, based on the view that limiting the impunity of perpetrators of grave human rights abuses signals to parties to the conflict that using any means necessary to further their aims would entail legal consequences.[37] To be sure, the view of international criminal accountability as a means to address conflict is not universally held by international criminal lawyers. Many argue, from a deontological perspective, that justice must be done for the sake of upholding norms. Yet, as scholars including Moyn and Schabas note, international criminal law has indeed become "an

[33] Mills 2015, 208. For more, see Teitt 2017, 326; Brown 2015, 158.
[34] Kim and Sharman 2014, 420.
[35] Cassese 1998, 11.
[36] Hurd 2010, 235; Weller 2002.
[37] Rodman 2014, 439.

overwhelmingly important feature of how conflicts are resolved"[38] as justice is "said to make an important contribution when nasty regimes are replaced or when protracted conflict with an ethnic dimension is being calmed."[39]

This linkage was most evident in the early 1990s, as the creation by the UN Security Council under its Chapter VII mandate of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) in 1993 and 1994, respectively, highlights how enforcing individual criminal accountability was integrated as part of the response to the crises in the Balkans and in Rwanda. This was based on a definition of international crimes as "those international criminal law normative proscriptions *whose violation is likely to affect the peace and security of humankind* or is contrary to fundamental humanitarian values, or which is the product of state action or a state-favoring policy."[41] This linkage is also reflected in the ICTY's mandate and website, which states "[t]he Tribunal has laid the foundations for what is now the accepted norm for conflict resolution and post-conflict development across the globe, specifically that leaders suspected of mass crimes will face justice."[42] While the ICTY and ICTR were created as ad hoc, time-limited, and situation-specific tribunals, the idea that justice should be pursued as a means to restore peace, rather than only after the end of hostilities, gained new prominence with the establishment of the permanent ICC.[43] The view that the Court is the pinnacle of dovetailing peace and justice is reflected in the words of the former ICC Prosecutor, "The [Rome] Statute ensures that the law will guarantee lasting peace, and that impunity for the worst perpetrators is no longer an

[38] Moyn 2017, 68.
[39] Schabas 2016, 5-6. See also Bass 2000, 284.
[41] Bassiouni 2003b, 24.
[42] Describing its creation, the ICTY states that the findings of the UN Commission of Experts "led the Security Council to decide that it would establish an international tribunal for persons responsible for these crimes *in order to stop the violence* and safeguard international peace and security." [emphasis added] (ICTY n.d. "About the ICTY" and "The Tribunal – Establishment") Regarding the conflict in the Balkans, the UN SC Resolution 827 (1993) was passed while the hostilities were ongoing. Regarding the conflict in Rwanda, the UNSC Resolution 955 (1994) expresses the same rationale. "Convinced that in the particular circumstances of Rwanda, the prosecution of persons responsible for serious violations of international humanitarian law would enable this aim to be achieved and would contribute to the process of national reconciliation and to the restoration and maintenance of peace." UN SC Resolution 955 (1994).
[43] The concept of 'peace' used in this thesis refers to 'negative peace,' or the absence of violence.

option."[44] For Bassiouni, the ICC was created to "remind governments that *realpolitik*, which sacrifices justice at the altar of political settlements, is no longer accepted."[45] Of the ten investigations currently open, six were opened while the conflict was still highly volatile.[46]

Resting on the same vision of law as a rule to rein in *realpolitik,* holding individuals criminally accountable for grave abuses is also often deemed to boost government legitimacy. The notion that curbing impunity would imbue "the new order with legitimacy and authority"[47] gained traction as shifts in the constitutive standards of sovereignty developed towards an ethos of 'sovereignty as responsibility.' Building upon UN Secretary-General Boutros-Ghali's Agenda for Peace of 1992, this concept views the state as accountable to its own population as well as to the society of states for the protection of its population and that "respect for human rights, therefore, is an essential element of responsible sovereignty."[48] Sovereignty has never been as absolute and uncompromised as this simplistic portrayal implies.[49] Yet, deepening support for the idea that sovereign statehood entails a responsibility to not only protect populations from, but also provide redress for, grave abuses means that the parameters of sovereign legitimacy have changed.

Thus, in light of the high sovereignty costs that the anti-impunity norm is considered to impose on states,[50] states would reasonably be extremely averse to launching national or international investigations into perpetrators of abuses, especially in situations of conflict where all sides, including government forces, are likely to have committed abuses that may amount to international crimes. If, in other words, the fight against impunity "acts as the thin edge of the wedge meant to open up state sovereignty in the name of universal moral and legal

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[44] Moreno Ocampo 2007c. See also Bensouda 2013a. Similarly, former ICC Prosecutor Moreno Ocampo stated, "The International Criminal Court…aims to confront centuries-old methods of behaviour – those of conflict and war, the abuse of civilians, women and children – and to reshape the norms of human conduct while violence is still ongoing, thus aiming, as stated in the Rome Statute, to contribute to the prevention of future crimes." Moreno Ocampo 2007d, 8

[45] Bassiouni 2013a, 649.

[46] These include Uganda (2003), Democratic Republic of Congo (2004), Central African Republic (2004), Darfur/Sudan (2005), Libya (2011), and Mali (2012). The decisions to open investigations in Kenya (2010), Côte d'Ivoire (2011), Georgia (2016), and Burundi (2017) came shortly after the end of the acute crises in these countries**.**

[47] Teitel 2014, 157.

[48] UN Doc. A/63/644 (2009) para 16; UN Doc. A/47/277 (1992).

[49] Glanville 2010.

[50] Abbott defines sovereignty cost as "the symbolic and material costs of diminished national autonomy." Abbott 1999, 361.

principles,"[51] then the frequency with which states do adopt anti-impunity measures is intriguing, especially in situations of conflict. Beginning in the early 1990s, there has been a striking and unprecedented spike in domestic efforts worldwide to address past human rights abuses by focusing on individual criminal responsibility.[52] Over 60% of conflicts since World War II have included at least one "judicial or quasi-judicial process initiated during an armed conflict that attempts to address wrongdoings that have taken or are taking place as part of that conflict."[53] More broadly, between 1980 and 2004, 48 states launched human rights prosecutions at the national level.[54] Also, between 1990 and 2008, there were approximately 40 prosecutions of heads of state for human rights crimes.[55]

Moreover, if states' ratification of the ICC Rome Statute is said to be "the most puzzling aspect of the Court" and "truly anomalous,"[56] even more puzzling is the number of governments that proactively *invite* the ICC to investigate crimes committed on its territory in the midst of armed conflict. Reflecting the wider scepticism of negotiators and non-governmental organizations, former Prosecutor of the ICTY Louise Arbour said that she could not "think of a single state that will voluntarily defer to the jurisdiction of the ICC if one of their nationals is implicated…it seems to me absolutely clear that the first thing the Prosecutor is going to have to do … is get into a huge battle with the state to try to get jurisdiction in the ICC."[57] Yet, governments in nine states have taken measures to facilitate the opening of ICC investigations into crimes committed in their territory or by their nationals.[58] As shown in Table

[51] Pensky 2016, 492.
[52] Sikkink 2011, 21.
[53] Loyle and Binningsbø 2018, 444.
[54] Kim and Sikkink 2010.
[55] Lutz and Reiger 2008.
[56] Simmons and Danner 2010, 227.
[57] Llewellyn and Raponi 1999, 97.
[58] These self-referrals and Article 12(3) declarations have occurred in three waves. The first three cases at the ICC were all based on self-referrals (Uganda in December 2003, Democratic Republic of Congo in March 2004, and the Central African Republic in December 2004). The second wave started six years later. In December 2010, Côte d'Ivoire confirmed an Article 12(3) declaration that had been issued by the Gbagbo government in April 2003. In July 2012, the Malian transitional government issued a self-referral. In 2014, the government in Central African Republic issued another self-referral regarding the renewed violence. In the third wave, a state has requested the ICC to open an investigation into alleged crimes committed on its territory nearly every year since 2013: the government of Comoros in May 2013, the government of Ukraine in April 2014 and again in September 2015, the government of Palestine in January 2015 and again in May 2018, and the government of Gabon in September 2016.

1, there have been eight instances of governments issuing self-referrals and four instances of governments lodging Article 12(3) declarations, with all governments requesting ICC intervention either during or shortly after armed conflict or post-electoral violence on their territory.[60] Six of the ten current ICC investigations stem from governments requesting the court to investigate in their country.[61]

Research Question

If the anti-impunity norm is indeed about "radically piercing the sovereign veil,"[62] then how to reconcile states' engagement with the imperative to hold perpetrators of grave abuses criminally accountable in the midst of armed conflict, in which the government's very existence and legitimacy was under threat, with the norm's role as sovereignty-constraining and as "an attempt to construct a bulwark of law against politics?"[63] Untangling this puzzle, this thesis examines cases in which governments express support for, and implement, anti-impunity measures in contexts of internal armed conflict marked by contested governmental legitimacy. Two under-studied cases - the 2010-2011 post-electoral crisis in Côte d'Ivoire and its aftermath as well as the ongoing conflict in Mali triggered in 2012 – offer a perfect lens through which to study this phenomenon. Overall, this thesis asks how and why does actors' usage of the anti-impunity norm influence the political dynamics of the internal conflicts in Côte d'Ivoire (November 2010 – July 2018) and Mali (January 2012 – July 2018).

This thesis focuses predominantly on the decision-making and conduct of national government actors in Côte d'Ivoire and Mali. Exploring national officials' 'engagement' with the anti-impunity norm means analysing how and why actors take measures in relation to the normative imperative to hold individuals accountable for the perpetration of grave human rights abuses. Studying 'engagement' is thus broader than 'compliance,' as it captures behaviour that goes beyond actors' legal obligations, ranging from discursive expressions of

[60] The frequency with which states have issued territorial state referrals has even led to new terminology: though the term 'self-referral' does not appear in the Rome Statute, it has become common parlance to refer to territorial state referrals as 'self-referrals.'

[61] These include Uganda in December 2003, Democratic Republic of Congo in March 2004, Central African Republic in December 2004 and again in 2014, Mali in July 2012, and Côte d'Ivoire in 2010.

[62] Mégret 2015b, 38.

[63] Engle, Miller, and Davis 2017, 5.

commitment to the norm to practical measures such as requesting ICC intervention. While it is not a 'compliance' study, studying how actors engage with the norm encompasses analysing how actors, discursively and practically, both support and undermine the normative imperative to pursue justice for these crimes. Relatedly, studying 'engagement' in this manner does not aim to analyse how actors try to adapt and reform the *meaning* of the norm to local circumstances, as done in 'norm localization' or 'norm circulation' approaches, but rather assumes the norm has a fixed meaning and studies how actors use the norm to shape political dynamics.[64]

This research question is particularly relevant in light of the current backlash against human rights and the evident fragility of the normative consensus underpinning this 'justice cascade,' even among states that have been supporters of the strengthening of the anti-impunity norm. For instance, between January 2017 and September 2018, in addition to increased support at the African Union for mass withdrawal from the Rome Statute, there were initiatives by governments in four African states to withdraw from the Rome Statute: Burundi, South Africa, The Gambia, and the Democratic Republic of Congo.[65] Shedding light on cases in which governments do not view the ICC's role in upholding the normative imperative to pursue criminal accountability for human rights abuses as a violation of national sovereignty is a valuable complement to better understanding those that do presume an opposition between anti-impunity measures and state interests.

The novelty of this study can be illustrated by noting what it does not seek to do. It does not aim to examine the causal impact of anti-impunity measures, both national human rights trials and the ICC's intervention, on the rate of violence, the rate of abuses, or peace duration, as various studies have done.[66] Nor does it seek to measure the impact of anti-impunity measures on conflict resolution. The research objective here is not to explain the different outcomes in the conflicts in Côte d'Ivoire and Mali, but rather to illustrate the process of norm exploitation itself. The study contributes to norm implementation scholarship but its objective here is not to assess the robustness of the anti-impunity norm, leaving the opportunity to

[64] Acharya 2004 and 2013.
[65] As of September 2018, Burundi is the only state that has officially withdrawn from the Rome Statute. Further, the United States boldly contributed to this anti-ICC mobilisation in September 2018 when National Security Advisor John Bolton made an incendiary speech denouncing the ICC and threatening sanctions against its judges and staff. AP 2018.
[66] Wippman 1999; Kim and Sikkink 2010; Sikkink 2011; Cronin-Furman 2013; Jo and Simmons 2014; Broache 2016; Hillebrecht 2016; Lie, Binningsbø, and Gates 2007.

interpret what the study's findings reveal about the norm's strength or weakness to future research. Further, while the study discusses the legitimation strategies of the governments in Côte d'Ivoire and Mali, it does not aim to assess whether the governments 'reached' legitimacy in both contexts. Rather, this thesis asks how and why does the usage of the anti-impunity norm by elite actors shape the political dynamics within the conflicts in Côte d'Ivoire (November 2010 – July 2018) and Mali (January 2012 – July 2018).

In answering this research question, this thesis contributes to an exploding field of research: the politics of pursuing justice in conflict-affected countries. Much has indeed changed since Abbott wrote in 1999 that relatively little international relations research existed on the atrocities regime.[67] Much of this literature seeks to understand how the peace vs. justice dilemma – a classic yet still central debate in the judicialization of international relations – plays out in practice. At a basic level, debates around the inherent value of the anti-impunity norm echoes a broader debate between legalists and sovereigntists, between those who view sovereignty as the *bête-noire* of international criminal law and between those who view international criminal law as an unwelcome transcendence of sovereignty.[68] This clash is captured by Cassese's view that "either one supports the rule of law, or one supports state sovereignty. The two are not…compatible."[69]

For the proponents of pursuing justice within conflict, the norm's value is justified interchangeably according to both deontological and consequentialist rationales. For the former UN Secretary-General Ban Ki-Moon, "when it comes to peace and justice, we are living in a new world."[73] Invoking the deontological rationale, he stated, "Yes, it may be true: demanding criminal accountability, at the wrong time, can discourage warring parties from sitting down at the negotiating table. Yes, it may even perpetuate bloodshed. Even so, one thing is clear: the time has passed when we might speak of peace versus justice, or think of them as somehow opposed to each other."[74] In this sense, as there is a moral obligation and a legal duty to hold perpetrators of international crimes accountable, justice must be done irrespective of its consequences and should never be compromised or sacrificed.[75] Invoking the consequentialist rationale, former UN Secretary-General Kofi Annan stated, "Peace and justice, if properly

[67] Abbott 1999, 364.
[68] Cryer 2005, 981.
[69] Broomhall 2003, 56; Cassese 1998.
[73] United Nations Secretary-General Ban Ki-moon 2012.
[74] United Nations Secretary-General Ban Ki-moon 2010b, 4.
[75] Nouwen 2012, 338.

pursued, promote and sustain one another. The question can never be whether to pursue justice, but rather when and how."[76] Along this rationale, as Vinjamuri notes, proponents have increasingly emphasised the "instrumental purposes of justice, essentially recasting justice as a tool of peacebuilding."[77]

For the sceptics, the anti-impunity norm inexorably clashes with state sovereignty, the fundamental cornerstone of international order. In a firebrand speech, US National Security Adviser John Bolton stated that the ICC "unacceptably threatens American sovereignty and US national security interests."[78] From a much more nuanced position, others note that pursuing justice undermines peace in the short and long term. The paralleled increase in negotiated settlements and the move towards pursuing justice during conflict has created new dilemmas for mediators, dilemmas rendered even more difficult when the ICC, as a permanent independent legal institution, is involved.[79] One commentator cautions that "the quest for justice for yesterday's victims of atrocities should not be pursued in such a manner that it makes today's living the dead of tomorrow."[80]

To study the role of international law in politics, this thesis adopts a lens that improves upon the limitations of conventional approaches. Scholars tend to diverge between "those who see [international law] as important and those who do not," or between liberals and realists.[81] On the one hand, liberal scholars explore how institutions can optimise international cooperation and help overcome conflict in the anarchic international system, by analysing design features such as enforcement measures, membership criteria, and transaction costs.[82] Applied to the atrocities regime, this approach predicts that a well-designed regime can hold perpetrators of atrocities accountable, deter future abuses, and lessen tensions.[84] Yet, this approach does not sufficiently consider the demands of politics as liberals tend to minimise the role of power within politics, and instead focus on how institutions and reforms can overcome collective action problems.[85]

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[76] UN Doc. S/2004/616 (2004).
[77] Vinjamuri 2010, 191; Nouwen 2012, 331.
[78] AP 2018.
[79] Toft 2010, 1; Zartman 2005, 2.
[80] Anonymous 1996, 258.
[81] Hurd 2016, 96.
[82] Rudolph 2001, 658; Fehl 2009, 359 – 360; De Silva 2017. See also Abbott and Snidal 1998.
[84] Rudolph 2001, 659.
[85] Jackson 2017b, 617; Hurrell 2001, 330.

On the other hand, realists generally hold that international law does little to shape government behaviour and rather reflects, rather than constrains, state power. International law is thus deemed a function of serving the political purposes of powerful states and conditioned by the vicissitudes of diplomatic power and strategy, and the perceived weak enforcement leads to expectation of low state compliance if doing so counters material interests. While some realists acknowledge that law can influence domestic politics as well as foreign policy decisions, through for instance lobbying by human rights organisations, international law will not inherently constrain the powerful since they craft and enforce the rules.[87] From a more normative angle, beyond deeming law to be epiphenomenal to international politics, realists also tend to argue that international law should not shape conduct, as it can distract and divert from important state matters.[88] Applied to the atrocities regime, realists argue that norms and law do not constrain power but are rather a function of power and see the ICC, for instance, as a tool of powerful states that (ab)uses the language of law to discipline some states while protecting others.[89] Yet, realists do not appreciate how norms, rules, institutions, and values are not simply reflections of power and material forces.[91] As Koskenniemi notes, realists do not sufficiently consider how the concepts they study - namely interest, power, and security - are themselves defined and operate within a normative context of international legal discourse.[92]

Despite their disagreement, both liberals and realists share a similar assumption of the relationship between law and politics. They assume law to be a set of rules that is inherently constraining and regulative of state power and the behaviour of actors. While both assume this vision of law, liberals find evidence that the choices of governments can be, and are indeed, constrained by international law. On the other hand, realists generally do not.[93] Rather than debating whether law matters or not, as it most certainly does, or whether the anti-impunity norm should be applied or not, this thesis adopts a different lens. Promoted by Hurd, an 'agnostic' view of international law examines "how international law is used in politics and how politics is shaped by law."[94] Such a view has been welcomed as a useful corrective to the

[87] Krasner 2002, 266.
[88] Kennan 1951 cited in Simmons 2009, 10.
[89] Mégret 2002, 1267; Ainley 2011, 319.
[91] Hurrell 2001, 330.
[92] Koskenniemi 1996, 465.
[93] Hurd 2017c.
[94] Hurd 2014, 46-47. This 'agnostic' view of international law refers to what Hurd notes is the disenchanted view of international law. However, in this author's view, the term 'agnostic' is

tendency to distinguish between law and politics, or an "overly positivist view" of international law that dominates the literature.[95] In contrast to the regulative model, this approach acknowledges the embeddedness, rather than opposition, between international law and international politics. It does not presume law to be an inherent constraint on state power and it accepts that implementing law may or may not lead to valuable goals of more order, accountability, and justice.[96] From this agnostic lens, this thesis assumes, as do Crawford and Koskenniemi, that "international law is what 'we' make of it"[97] and explores *how*, *why, to what effect*, and *for whose benefit*?[98]

This view shares constructivists' focus on norm diffusion and, as such, this thesis contributes to the scholarly literature on the relationship between norms and state behaviour. While classic approaches to norm diffusion view norms as shaping state behaviour through gradual and staged internalization of the norm's appropriateness in large part due to the influence of pressure groups, this thesis joins a stream of scholarship that explores the strategic use of norms and thus considers the influence of power and interests in the process of norm diffusion. In this sense, it differs slightly from earlier scholarship's tendency to "counterpose the logic of consequences with the logic of appropriateness."[101] Indeed, viewing power as a significant and even sometimes prevailing force in international relations is not inconsistent with viewing norms as central to shaping politics.[102] Assuming states are strategic actors operating in socially constructed contexts, this view examines the power-politics that take place within and through international law and explores "how legalization shapes and is shaped by political power."[103]

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preferable to 'disenchanted,' as the latter implies a much more negative and disillusioned view of international law than the neutral one that Hurd presents. Rather than being disappointed or with international law, as the term 'disenchanted' implies, this view is based on agnostic, or neutral, presuppositions about international law.

[95] Comments by Ian Johnstone and Hilary Charlesworth on back cover of Hurd 2017a.

[96] Hurd 2017a, 3; Hurd 2016, 97. This approach reflects with Dancy and Fariss term the "constitutive model," which examines the generative qualities of human rights law and assumes that human rights law "can become politically and socially productive, often in unpredictable ways." Dancy and Fariss 2017, 12.

[97] Crawford and Koskenniemi 2012, 7.

[98] Nouwen 2013, 33.

[101] Kim and Sharman 2014, 422.

[102] Hurrell 2007, 330.

[103] Hurd 2005, 497; Hurd 2016, 98-99.

More specifically, this thesis contributes to a pool of studies that examines how the pursuit of justice for grave abuses can form part of political strategy and views transitional justice mechanisms as emerging from, and being shaped by, the complex and sometimes backdoor elite political bargaining processes.[104] Studying the domestic political conditions within which the anti-impunity norm is implemented, or undermined, is thus crucial to understanding why the desirable goal of bringing justice to victims of mass atrocities can be fulfilled or left unfulfilled as it becomes entangled in domestic political contestation.[105] However, rather than assume that states' engagement with the anti-impunity norm for strategic purposes as inherently normatively objectionable, as some argue, this thesis adopts the original meaning of the term "lawfare" as a value-neutral concept, as it depends on *how* the norm is used.[106] This thesis thus offers a more refined way to analyse why, how, and to what effects do actors use the anti-impunity norm in contexts of internal conflict.

Argument

This thesis argues that national authorities in both Côte d'Ivoire and Mali used the anti-impunity norm as a resource in their strategies of political contestation in contexts of internal armed conflict marked by weakened governmental legitimacy. Deploying measures that both supported and undermined the imperative to investigate and prosecute grave abuses enabled embattled governments to influence the political dynamics of a conflict-affected country, influencing parties' reputations and power relations. Doing so helped in bolstering the government's legitimacy through the delegitimation of its opposition.

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[104] Bell 2017, 102. See, for instance, Bell 2017; Clark 2019; Lake 2017; Bass 2016; Peskin and Boduszynski 2016; Cronin-Furman 2015; Rodman 2014; Rodman and Booth 2013; Nouwen and Werner 2010; Simmons and Danner 2010; Lamont 2010; Subotić 2009; Grodsky 2009; Peskin 2008; Branch 2007; Rowen and Rowen 2017; Leclercq 2017; Loyle and Davenport 2016; and Mihr 2017.

[105] Subotić 2009, 6.

[106] According to some, the use of law as a weapon is undesirable as law should be divorced from politics. However, according to the former Prosecutor of the Special Court for Sierra Leone, law can and should "be used as a powerful weapon." Crane 2010, 201. Rather than the pejorative connotation that the term has acquired, which views lawfare as the misuse and abuse of law for pre-determined politico-military goals, lawfare was coined as an a priori ideologically neutral concept. On the original meaning of lawfare, see Kittrie 2016, 6; Werner 2010.

This was achieved through a process of 'norm exploitation.' Coined here, norm exploitation refers to how actors can draw benefits from the norm's specific features and functions, in order to further a particular objective. First, the way in which elite actors pursue justice for grave abuses is arguably based on an assessment of how they should engage with their opposition in order to gain an advantage towards achieving their objectives in the context of internal conflict. In this sense, the way in which individual accountability for international crimes is pursued reflects a cost-benefit analysis on whether to exclude or include given interlocutors, depending on the interlocutor's political value to elite objectives. Second, actors capitalise on the norm's enforcement features, namely the state's relative centrality in the norm's enforcement at both the national level and within the Rome Statute system, to navigate the flexibility within the content of the norm itself.

Third, the anti-impunity norm's functions make it a particularly useful resource for actors to shape the political dynamics of conflict-affected contexts and further its strategy to boost its legitimation as the norm's two functions overlap with two basic criteria of government legitimacy: actors' claim to being members of the international community and actors' ability to exercise effective control. First, the norm's branding effect serves as a way to villainize and privilege political actors as (il)legitimate, thereby enabling the government to reify its claims that it belongs to the international community and discredit its opposition. Second, in parallel, the norm serves as a means of coercive leverage and neutralisation, enabling the government to empower and weaken certain actors in order to optimise its ability to exercise effective control over the territory. Capitalising on the norm's features and functions can thus help discursively include and exclude, as well as empower and weaken, actors, thereby serving as a resource in the pursuit of broader objectives.

In sum, this thesis thus shows how elite actors set the parameters of accountability and impunity in light of their objectives within the political bargaining processes, rather than simply as a function of having internalized the 'oughtness' of the anti-impunity norm through international and domestic pressure by pro-human rights groups. Applicable to similar contexts as well, the concept of norm exploitation offers a way to analyse how and why the strategic deployment of accountability by elites can further objectives, by exploring the aims, selectivity, and effects of anti-impunity measures.

Case Selection

This is the first and only two-country study of the politics of anti-impunity efforts in Côte d'Ivoire and Mali. Despite the launch of national and international justice measures in Côte d'Ivoire and Mali in 2010 and 2012, respectively, and despite the trials of four individuals at the ICC, these two cases are overlooked in the voluminous literature on conflict-related justice and the ICC. Even recent multi-case studies on conflict-related justice processes do not, or only very briefly, explore these cases.[108] This thesis thus bridges a linguistic-thematic divide: while the literature on conflict-related justice and the ICC is dominated by Anglophone scholars and has not fully explored the Côte d'Ivoire and Mali cases, the literature on Côte d'Ivoire and Mali is primarily generated by Francophone scholars and has not fully addressed the issue of conflict-related justice.

This thesis is not a strictly comparative study and does not seek to systematically compare and contrast outcomes across these contexts. Rather, exploring these two cases acknowledges that "politics and law may interact simultaneously or sequentially in ways that take different forms and exert different relative primacy under different scope conditions."[109] Based on a most-similar case comparison, Côte d'Ivoire and Mali were selected not to be representative of all potential types of conflict, but as a unique pair whose similarities as well as key differences allow for loosely comparative study into why, how, and to what effect did actors use the anti-impunity norm in contexts of internal conflict.[110]

In terms of their similarities, these two cases of internal armed conflict in the same region over the same time period feature similar actors that officially expressed similar support of the anti-impunity norm and implemented similar anti-impunity measures. Indeed, national authorities in both countries, where the governmental legitimacy was intensely contested and where forces on all sides were accused of human rights abuses, including governmental forces, expressed support in public statements for the importance of pursuing justice for grave crimes and implemented anti-impunity measures at the domestic levels, including issuing arrest warrants, holding trials, cooperating with the ICC in transferring indicted individuals, and

[108] Hayner 2018; Clark 2018.
[109] Vinjamuri and Snyder 2015, 304.
[110] Bennett and Elman 2007.

requesting the establishment of international commissions of inquiry to investigate the commission of international crimes. In parallel, governments in both countries selectively released prisoners and issued formal and de facto amnesties. These measures were part of a broader set of transitional justice measures, including the establishment of truth and reconciliation commissions in both countries – though these non-judicial efforts fall outside the scope of this thesis.

Further, the governments in both countries requested investigations by the ICC at the very beginning of their respective crises. The ICC investigation in Mali was based on a territorial state referral, or 'self-referral.' As one of the three mechanisms available to trigger the ICC's jurisdiction, the most direct way for states to request the opening of an ICC investigation into crimes committed in their territory or by their nationals is through a state referral. According to Article 14 of the Rome Statute, States Parties can refer to the ICC Prosecutor a situation in the territory of another State Party or in their own territory, known as a territorial state referral, in which one or more crimes within the ICC's subject-matter jurisdiction appear to have been committed and request the Prosecutor to investigate such crimes.[111] The less direct way for states to request the opening of ICC investigation into crimes committed in their territory or by their nationals is to lodge an Article 12(3) declaration.[112] States that are not States Parties but that seek to establish grounds on which the Court can base its jurisdiction can issue such a declaration, in which the government accepts the exercise of the Court's jurisdiction with respect to a particular time-bound situation in their country. Following an Article 12(3) declaration, the Court's jurisdiction still needs to be triggered by one of the three trigger mechanisms. The ICC investigation in Côte d'Ivoire was not formally a self-referral, but rather was opened through the Prosecutor's *proprio motu* powers based on the Article 12(3) declarations issued by the Ivorian government. The Ouattara administration issued two reconfirmations, in December 2010 and May 2011, of the original Article 12(3) declaration lodged by the Gbagbo administration in April 2003. The reason the Ouattara

[111] The two other mechanisms by which to trigger the ICC's jurisdiction are the Prosecutor's *proprio motu* powers to independently initiate investigations into crimes committed by nationals, or in the territory, of States Parties and through the United Nations Security Council's ability to refer cases to the ICC.

[112] According to Article 12(3) of the Rome Statute, "If the acceptance of a State which is not a Party to this Statute is required under paragraph 2, that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question. The accepting State shall cooperate with the Court without any delay or exception in accordance with Part 9."

administration did not issue a 'self-referral' was because it was not possible, as Côte d'Ivoire had not yet ratified the Rome Statute. The Côte d'Ivoire situation is thus distinct from a formal self-referral but indeed comparable in terms of its political dimension. While self-referrals and the lodging of Article 12(3) declarations are legally distinct, both measures reflect the government's similar political interest in having the ICC investigate crimes committed in their territory or by their nationals. More broadly, comparing cases in which governments proactively engage with the anti-impunity norm with cases in which governments actively reject the norm can obscure the internal political dynamics and cloud sharp analysis.

Additionally, despite the highly distinctive origins and dynamics of both conflicts, Côte d'Ivoire and Mali is the only pair of countries that featured significant overlap between actors involved in responding to and managing the conflict over the same time period and in the same region. Experiencing moments in which its legitimacy was in serious jeopardy, the governments in both countries welcomed significant international political, military, and legal intervention by the same international organisations and institutions, namely the United Nations, ECOWAS, and the African Union over the same period of time. In addition, France played a key role in managing the crises in both countries, including through internationally-sanctioned military intervention based on requests by respective governments. Importantly, the aim of the international interventions in both countries was to bolster the legitimacy of the government and the authority of the state more broadly.

A key difference is the political landscape and outcome of these two conflicts. The politico-military conflict in Côte d'Ivoire is dualist, in light of the historic and continued polarization between pro-Gbagbo and pro-Ouattara sides, and the post-electoral crisis ultimately ended through one-sided (electoral-)military victory. In contrast, the Malian conflict is pluralist in nature, as the government is confronting a variety of armed opposition groups, marked notably by extremely fluidity between proliferating groups. While the conflict is far from over and hostilities continue, the government, with support and pressure by the UN, AU, and ECOWAS, is broadly pursuing a negotiated settlement with some groups combined with a military approach towards other groups.

While relevant to a wide variety of contexts, the dissertation's theoretical framework is not assumed to be generally applicable across cases irrespective of their differences. The scope conditions for this study's theoretical claims are the following. The framework is relevant to states affected by internal armed conflicts, and takes a broad definition of the duration of

conflict, studying both during-conflict and post-conflict dynamics. The framework thus does not directly apply to other types of politically volatile situations, such as democratic transitions or non-internal armed conflicts. Relatedly, this framework focuses on contexts in which anti-impunity measures are taken during, or shortly after, the conflict, and are thus directly relevant to the political dynamics of the conflict. By extension, a relevant condition is the expression of support, both discursively and through practical measures, for the anti-impunity norm. While governments that express support may of course exhibit variance in the genuineness of their commitment to the norm, the way governments position themselves in relation to the norm matters, as this can range across the spectrum from antipreneurs to entrepreneurs.[113] This framework is thus not applicable to states in which governments reject the legitimacy of the norm itself or the institutions that enforce it, including the International Criminal Court.

A further relevant condition is the strength of the state's domestic institutions, namely the separation of powers between the executive and judicial branches. A common characteristic of conflict-affected contexts is the weakening of judicial independence due to the consequences of hostilities on the practical capacity of judicial actors but also due to the increased interest by the executive and possibly legislative authorities to shape the judiciary due to heightened stakes during and shortly after conflict. The weakening of judicial independence in conflict-affected contexts may not be strictly related to the hostilities, and can be a longer-term rather than context-dependent feature.

This framework is not necessarily limited to a particular type of regime. The two cases of Côte d'Ivoire and Mali are multi-party democracies, albeit featuring structural weaknesses within their democracies, but the framework is not only applicable to multi-party democracies. However, while this framework could theoretically apply to authoritarian states or consolidated democracies, the likelihood of these types of regimes fulfilling the other conditions (namely the expression of support for the anti-impunity norm in authoritarian states and the weak judicial independence in consolidated democracies) is, however, likely to be low. In terms of temporal scope conditions, as this thesis focuses on cases in which governments have requested ICC intervention, the framework is applicable to situations since the establishment of the ICC in 2002. More broadly, this date is also key in the evolution of the strengthening and crystallization of the anti-impunity norm, as the ICC enforces a 'strong' version of the anti-

[113] Bloomfield 2016; Mills and Bloomfield 2018.

impunity norm.[114] While tailored, this dissertation's framework is more widely applicable than the ostensibly narrow scope conditions suggest.

Methodology

This study responds to calls made by leading scholars to empirically examine the effects of international law through methods of political science.[115] Methodologically, the study is grounded in in-depth qualitative case study research strategies. The conceptual framework was developed by first conducting a review of literature on the anti-impunity norm's implementation, norm diffusion, and government legitimation. Then, the data gathered empirically, namely elite interviews and documentary evidence was analysed through process-tracing and content analysis. These are the most appropriate methods, particularly for analysis of norm implementation in politically-volatile contexts, as process-tracing helps inductively identify the strategies used by decision-makers and the relationship between certain factors and variables and decision processes and outcomes.[116] Since decisions surrounding conflict-related accountability are a function of the particular power-laden dynamics of each conflict, goals of political leaders, and concerted advocacy by activists, such a methodology is particularly useful.[118] Based on the collection and analysis of data, the conceptual framework was modified over time through an iterative process between empirical research and theory development.

This research draws upon several sources of evidence. This includes documentary evidence ranging from declarations in both English and French by government officials, statements by governments and international organisations (both official and leaked), reports by national and international human rights organisations and other non-governmental organisations, media reports, and legal transcripts, as well as secondary source literature.[120] This evidence base also included "opportunistic" [121] data collection in the form of

[114] Mills and Bloomfield 2018, 2. "And the ICC is dedicated to enforcing a 'strong' version of this norm – meaning *all* perpetrators of mass atrocity crimes, *including states' highest officials*, can be held accountable before competent courts."
[115] According to André Nollkaemper, "[E]mpirical enquiry […] into what is actually going on is rare…Such research can rely on tools and methodologies used routinely in political science and economics." Nollkaemper 2016.
[116] Mintz, Geva, Redd, and Carnes 1997, 556; Betts and Orchard 2014, 19.
[118] Sieff and Vinjamuri Wright 1999.
[120] All translations of French-language sources and interviews are the author's own.
[121] Hartley 2005, 324.

autobiographical books written by key actors about the events in question.[122] Though a rare source of insight that helps corroborate information and build a kaleidoscopic vision of the five-month crisis, these 'tell-all books' were treated, just like elite interviews, with a healthy degree of critical distance.

Also, in-depth fieldwork is one of the hallmarks of "implementation research" as it enables the study of the micro-mechanisms of norm implementation.[123] This thesis draws upon 83 elite interviews conducted with 71 respondents.[124] These interviews were gathered through fieldwork in Abidjan (October-December 2015, January-March 2017), Paris (February-April 2016), The Hague (January 2016, September 2016, and September 2017), as well as by phone/Skype. As security concerns complicated the feasibility of conducting fieldwork in Mali, interviews were conducted in person, over the phone and via Skype with relevant individuals.[125]

Interviewees were selected based on their first-hand knowledge of the political context and judicial processes regarding conflict-related abuses, forming a fairly small "sample universe."[126] Interviewees included current and former government officials and opposition leaders, UN officials, ambassadors and other diplomats, civil society leaders, members of national judiciaries, and representatives of international and national human rights organisations. As the interviewees did not form part of a clear and predetermined category of individuals, the "snowball sampling" method helped identify other relevant contacts. This method is particularly useful in accessing interviewees in light of the sensitivity of the research topic, as a chain of referrals increases rapport and trust.[127]

The interviews were semi-structured, as these diverse actors all had unique positions and areas of expertise. Depending on their perspective, interviewees were asked to comment upon events they were personally involved in, explain the intentions behind their conduct, and

[122] These include books by the former President of Côte d'Ivoire Laurent Gbagbo, former Minister of Youth Charles Blé Goudé, former French Ambassador to Côte d'Ivoire Jean-Marc Simon, former French President François Hollande, and former UN Special Representative for the Secretary-General in Côte d'Ivoire Young Jin Choi.
[123] Betts and Orchard 2014, 19.
[124] Interviewees were sometimes interviewed several times in light of their in-depth knowledge of the subject.
[125] The Department of Politics and International Studies (POLIS) of the University of Cambridge refused to authorise the author's planned trip to conduct fieldwork in Mali.
[126] Robinson 2014, 25.
[127] Clark 2006.

corroborate or challenge other interpretations of events.[128] As 'insiders,' interviewees were also asked to help access helpful data sources, such as draft versions of peace agreements and policy and legal documents. The data generated through primary and secondary sources was, wherever possible, cross-validated and triangulated to optimise analytical accuracy and verifiability. Interviews were conducted in English and French by the author without translation. In light of the sensitivity of certain information, the conversations were tape-recorded only when the interviewee explicitly agreed to the recording. Equally, some interviewees' identities are kept anonymous as they may not have been authorised to disclose such information or when the publication of such information could have negative consequences. When including contextual details, the date, or the location of the interview would divulge identifying information, this information is omitted from the reference. Overall, this empirical approach, grounded in two in-depth qualitative case studies, can help probe and nuance the findings generated from the large-n quantitative cross-case comparative approach used by many influential studies in the literature that, in the search for generalizable conclusions, downplay the specificity of local contexts and the unique perspectives of actors.

Conclusion and Outline

Both scholars and practitioners are increasingly realising the need to pay attention to the messiness of the unique political contexts within which the 'fight against anti-impunity' takes place and the complicated and often obscure elite political bargaining processes, moving beyond focusing exclusively on institutional design and a cookie-cutter approach to understanding transitional justice processes. Yet, as Bell notes, "how to understand political bargaining processes around justice remains under-theorized and under-researched."[129] By drawing on new empirical material, this thesis offers a way to analyse the political productivity of the anti-impunity norm and the strategic politics behind the 'deployment' of criminal accountability. By offering a way to understand what it is about norms that make them useful resources, it contributes to studying the relationship between international norms and state conduct from a pragmatic approach, one that brings in notions of power, interests, and bargaining. By deconstructing the norm's features and functions, the concept of norm

[128] Moyser 2006, 85. When appropriate, interviewees were also invited to distinguish between the official accounts of their affiliated institution as well as their personal interpretation.
[129] Bell 2017, 102.

exploitation helps in understanding how norms, as vague and instrumentally malleable, serve as resources for actors involved in their implementation. It also helps to consider how the institutional system shapes the norm's implementation.

Through this new conceptual framework, it shows specifically how the anti-impunity norm can serve as part of strategies to shape the political landscape of conflict-affected countries and in cases where governmental legitimacy is in jeopardy. Indeed, it offers a way to analyse how and why the anti-impunity norm's implementation favours certain actors and outcomes over others, by exploring the aims, selectivity, and effects of anti-impunity measures. In doing so, it joins other studies that view legitimation "as a strategic move in a political game [that] needs to be understood as much a part of the messy world of politics as of the idealized world of legal and moral debate."[130] However, it improves upon the weaknesses in the literature on the legitimating effects of the anti-impunity norm by offering a way to understand the mechanics through which using the anti-impunity norm influences at least two criteria of government legitimacy.

This thesis is composed of eight chapters. As the introduction, Chapter 1 sets out the problématique, the research question, the central argument, the methodology, and an outline of the thesis. Chapter 2 presents the origins and substance of the anti-impunity norm in more detail. It then situates this study within the broader literature on norm diffusion, focusing on the value of exploring norm usage, and surveys how studies have explored the strategic use of the anti-impunity norm in various conflict-affected contexts as a means, among other objectives, to legitimate national authorities. To improve upon gaps identified in the literature, Chapter 3 then presents the concept of norm exploitation, a novel way to understand actors' usage of the norm as a function of the interacting factors of elite strategy, the norm's enforcement features, and the norm's functions.

Applying this framework, the case studies are then addressed sequentially, immersing the reader in the distinct political environment of each country, while linking the two by asking the same guiding questions. The case study on Côte d'Ivoire spans Chapters 4 and 5. The case study on Mali spans Chapters 6 and 7. The first chapter of each case study addresses the acute crises and the second chapter addresses the years following the crises. After first providing

[130] Hurrell 2007, 79.

contextual background, each chapter analyses how actors capitalised on the anti-impunity norm's features and functions to influence the conflict's evolution.

To conclude, Chapter 8 first presents a table that captures the relationships between elite strategy and accountability measures. It then recapitulates how these relationships played out in Côte d'Ivoire and Mali, before summarising how the main findings fit within the literature on the strategic use of justice measures. It then analyses why the ICC's decisions complemented elite interests and considers what this means for international criminal justice more broadly. The chapter concludes by surveying this dissertation's findings and charts paths for future research.

Table 1: Governments' Issuance of Self-Referrals and Article 12(3) Declarations between 2002 and 2018 [as of September 2018]

Date	**Country (Head of State at the time)**	**Article 14 Self-Referral or Article 12(3) Declaration**	**Status of conflict at time of request for ICC investigation**	**Status of ICC Investigation**
January 2004	**Uganda** (Museveni)	Self-Referral	Ongoing	Active (since July 2004)
April 2004	**Democratic Republic of Congo** (Kabila)	Self-Referral	Ongoing	Active (since June 2004)
December 2004	**Central African Republic** (Bozizé)	Self-Referral	Ongoing	Active (since May 2007)
April 2003	**Côte d'Ivoire** (Gbagbo/Ouattara)	Article 12(3) Declaration	Ongoing	Active (since October 2011)
December 2010		Article 12(3) Declaration		

July 2012	**Mali** (Traoré)	Self-Referral	Ongoing	Active (since January 2013)
May 2013	**Comoros** (Dhoinine)	Self-Referral	Not ongoing	Closed – Decision not to proceed (Under Appeal)
May 2014	**Central African Republic II** (Samba-Panza)	Self-Referral	Ongoing	Active (since September 2014)
April 2014	**Ukraine** (Turchynov/ Poroshenko)	Article 12(3) Declaration	Ongoing	To be determined – Under Preliminary Examination
September 2015		Article 12(3) Declaration [131]		
September 2016	**Gabon** (Bongo)	Self-Referral	Ongoing	Closed – Decision not to proceed
January 2015	**Palestine** (Abbas)	Article 12(3) Declaration	Ongoing	To be determined – Under Preliminary Examination
May 2018		Self-Referral		

[131] On 8 September 2015, the Government of Ukraine lodged a second declaration until Article 12(3), this time accepting the ICC's jurisdiction in relation to alleged crimes committed on its territory from 20 February 2014 onwards, with no end date.

Chapter 2: The Anti-Impunity Norm

Introduction

This chapter first presents in more detail the subject of this thesis – the anti-impunity norm - by exploring the evolution and extent of a state's duty to investigate and prosecute grave abuses. It then situates this study within the expanding literature on norm diffusion, highlighting the value of exploring norms as strategic resources. The chapter continues by surveying the strengths and gaps within the extant scholarship on the strategic use of justice in conflict-affected settings, highlighting especially the blurriness in the link between pursuing justice and legitimation. Finally, the chapter concludes by identifying how exploring the anti-impunity norm's implementation in Côte d'Ivoire and Mali not only fills gaps in literature on conflict-related anti-impunity measures but also furthers scholarly understanding of the conflicts in Côte d'Ivoire and Mali.

The Anti-Impunity Norm: A Duty to Prosecute?

Since the end of World War II, through the gradual creation of new laws, political commitments, and institutions, a model of state accountability and a model of individual criminal accountability emerged as part of a historic shift away from the traditional model of impunity for grave abuses - with all three models coexisting today.[134] The emergence of the anti-impunity norm, which gained significant momentum particularly since the 1990s, meant that states were increasingly expected to fulfil their duty to investigate and prosecute alleged perpetrators of international crimes. The extent of a state's legal duty to prosecute all grave abuses in its jurisdiction is, however, not seen as clearly rising to customary international law, due in part to the patchiness of binding legal obligations and state practice. In parallel, a different version of the norm has developed with the creation of international criminal courts, in which international courts are expected to investigate and prosecute perpetrators of international crimes when states are unable or unwilling and, importantly, do not require states to investigate and prosecute. More broadly, since international crimes are seen as violations of

[134] Sikkink 2011, 14-16.

fundamental norms of humanity and an affront to the international community as a whole, the international community is expected to support domestic and international prosecutions.[135] In a sense, the creation of international courts can thus undermine the norm according to which states have a duty to investigate and prosecute. Within this system of international justice that features both domestic and international courts, the anti-impunity norm has two versions: states must, and also do not always have to, investigate and prosecute in domestic courts. These two divergent normative directions form part of a broader conception of the norm: the political expectation, based on extensive though not comprehensive legal obligations, that states must take measures to hold alleged perpetrators criminally accountable for grave abuses in domestic jurisdictions and, when unable or unwilling, cooperate with investigations and prosecutions in international criminal courts.

While individual criminal accountability has a history(ies) that begin(s) far earlier than the Nuremberg trials, these trials nevertheless mark a watershed moment as "the first genuinely international criminal prosecution."[136]Among other legacies, Nuremberg established crimes against humanity as an international crime and helped develop the view that a government's treatment of its citizens and others should be subject to international regulation and, relatedly, that certain crimes should be subject to international criminal jurisdiction.[137] It also reflected a growing sense of responsibility of the international community to respond to these "unimaginable atrocities that deeply shock the conscience of humanity."[138]

Over the next few decades, a series of new human rights treaties and legal instruments were adopted, including the Universal Declaration of Human Rights, the Convention on the Prevention and Punishment of the Crime of Genocide, the International Convention on the Elimination of All Forms of Racial Discrimination, the International Covenants on the Civil and Political Rights and on Economic, Social, and Cultural Rights, the Convention on the Elimination of All Forms of Discrimination Against Women, the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Convention of the

[135] Ratner and Abrams 1997, 295.
[136] As Schabas explains, it was "the first genuinely international criminal prosecution in that it was conducted by a tribunal created by treaty between states, where the accused were prosecuted not for ordinary crimes but for offences against international law." Schabas 2012, 10.
[137] For instance, the International Law Commission's codification of the Nuremberg Principles in 1950 established that war crimes and crimes against humanity were subject to international criminal jurisdiction.
[138] Preamble of the Rome Statute.

Rights of the Child, and the International Convention for the Prosecution of All Persons from Enforced Disappearance.[139] These legal instruments are based on a model of state accountability, "in which the state as a whole was held accountable for human rights violations and was expected to take action to remedy the situation."[140]

Many of these instruments do not include measures to hold individual state officials accountable, meaning there are limited consequences for states and individuals who violate the rights enshrined in some these conventions. Yet, some do require states to investigate and prosecute individuals - reflecting the emergence of a model of individual criminal accountability. For instance, the Geneva Conventions of 1949 and Additional Protocol I of 1977 established a duty on states to carry out investigations, prosecutions, or punishment.[141] These conventions "confirmed the new expectation of individual criminal responsibility for international law breaches" and "made such breaches subject to universal criminal jurisdiction, distinguishing them from those breaches that give rise only to state (civil) responsibility."[142] However, this applies only to grave breaches, which does not cover all war crimes as such. Also, the 1948 Genocide Convention established that persons guilty of genocide "shall be tried by a competent tribunal of the State in the territory of which the act was committed" or by an international tribunal if the relevant states have accepted its jurisdiction, thereby establishing genocide as an international crime that triggered international criminal jurisdiction.[143] Also, while a treaty relative exclusively to crimes against humanity does not yet exist, specific offences that fall under crimes against humanity are addressed in other conventions, including the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or

[139] Ratner, Abrams, and Bischoff 2009, 7.
[140] Sikkink 2011, 14.
[141] First Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Art. 49; Second Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Art. 50; Third Geneva Convention Relative to the Treatment of Prisoners of War, Art. 129 ; Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Art. 146; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (I).
[142] Van Schaack and Slye 2007, 39.
[143] Article 1 of the 1948 Genocide Convention provides that Contracting Parties undertake to "prevent and punish" genocide and Articles 4-6 provides that alleged perpetrators of genocide or any acts outlined in Article 3 shall be punished, that Contracting Parties shall enact necessary legislation to provide effective penalties for persons guilty of genocide, and that the persons charged with genocide "shall be tried by a competent tribunal of the State in the territory of which the act was committed" or by an international tribunal if the relevant states have accepted its jurisdiction.

Punishment, which states that States Parties in whose jurisdiction a person is alleged to have committed any offence listed in the convention shall prosecute or extradite suspected persons.[144] The Convention on Disappearances states that States Parties shall prosecute or extradite the individual to another State or surrender the individual to an international criminal tribunal. Further, a UN General Assembly Resolution 2840 adopted in 1971 urged all states to either prosecute or extradite and to support, through cooperation, the prosecution of perpetrators in other jurisdictions.[145] Similarly, the General Assembly's 1973 Principles of Co-operation, passed without opposition, indicated that no state expressed resistance to the declaration that "war crimes and crimes against humanity, wherever they are committed, shall be subject to investigation, and the persons against whom there is evidence that they have committed such crimes shall be subject to tracing, arrest, trial, and, if found guilty, to punishment."[146] While UN General Assembly Resolutions and declarations do not create binding obligations, these two can be interpreted as reflecting states' opinion that this obligation existed. These conventions thus contributed to the emergence of a model of individual criminal accountability, which is limited to a subset of the range of rights covered in conventions adopted since World War II.

Some argue that the range of human rights treaties that require states to investigate grave human rights violations and take actions against those responsible suggest that a duty on states to investigate and take actions against alleged perpetrators, including prosecution or extradition, exists in customary international law.[147] This view is also motivated by the fact that imposing duties on states to investigate, prosecute, and compensate victims for such crimes

[144] Under Articles 4-8, State Parties shall make all acts of torture offences under its criminal law and establish jurisdiction over the offences, as well as cooperate fully with the prosecuting jurisdiction in the gathering and preservation of evidence, and thus extradite or prosecute irrespective of where the crime was committed. UN Doc A/39/51 (1984), 197.
[145] "Urges all States to… ensure the punishment of all persons guilty of [war crimes and crimes against humanity], including the extradition to those countries where they have committed such crimes…Further urges " all States to co-operate in particular in the collection and exchange of information which will contribute to the detection, arrest, extradition, trial and punishment of persons guilty of war crimes and crimes against humanity… Affirms that refusal by States to co-operate in the arrest, extradition, trial and punishment of persons guilty of war crimes and crimes against humanity is contrary to the purposes and principles of the Charter of the United Nations and to generally recognized norms of international law." UN Doc A/RES/2840 (XXVI) (1971), paras 1-4.
[146] UN Doc. A/RES/3074 (XXVIII).
[147] Roht-Arriaza 1990.

is essential to making the efforts to deter and prevent future abuses meaningful.[148] However, scholars are not in consensus as to whether customary law imports an obligation on states to investigate and prosecute international crimes.[149] According to Orentlicher, states that have signed certain human rights treaties indeed have a duty to ensure that criminal proceedings were instituted against those suspected of specified violations of human rights, such as genocide and torture, but, even if impunity for atrocious crimes is incompatible with states' general obligation to ensure the enjoyment of fundamental rights, customary international law does not require states to prosecute every offense.[150] Also questioning whether the duty to prosecute or extradite perpetrators of these crimes exists in customary international law, Freeman and Pensky argue that, while some crimes are prohibited by treaties that require states to hold the perpetrators accountable, these treaties also stipulate that national authorities can determine whether to prosecute in a similar manner as they would for ordinary offences. Since this discretion enables selective prosecutorial strategies, states do not necessarily violate their obligations if they do not prosecute all perpetrators of these crimes.[151] From a different perspective, some argue that this duty to prosecute arises from their *jus cogens* nature, which gives rise to obligations *erga omnes*, "owed to the international community as a whole and to each of its members."[152] As expressed by Bassiouni, for instance, "The crimes establish inderogable protections and the mandatory duty to prosecute or to extradite accused perpetrators, and to punish those found guilty."[153] However, other scholars question the idea that the duty to prosecute international crimes arises from their *jus cogens* nature.[154]

In parallel, there has been a significant normative shift unequivocally endorsed by the UN against amnesties for grave abuses, especially war crimes, crimes against humanity, and

[148] Broomhall 2003, 56. For instance, even if the International Covenant on Civil and Political Rights (ICCPR) is silent about a duty to punish violations of the rights ensured by the Covenant, some argue that the text of Article 2, which establishes that each state party "undertakes to respect and to ensure to all individuals" the rights it recognises, means that "states are obliged to take specific steps to redress the wrong committed by each violation of a right." Mendez 1997, 259.
[149] Orentlicher 1991, 2537 – 2615; Nouwen 2013a, 39; Jackson 2017b, 620; Akhavan 2010, 1.
[150] Orentlicher 2007, 14.
[151] Transitional Justice Institute 2013, 10 – 11. According to Schabas, "[i]t might be safer to say that although state practice is evolving, and that amnesties in peace agreements are increasingly viewed with disfavour, a prohibitive legal rule has not crystallized." Schabas 2012, 177 – 188.
[152] Broomhall 2003, 56.
[153] Bassiouni 1996, 17.
[154] Jackson 2007, 123.

genocide.[155] The UN Human Rights Committee stated blanket amnesty laws and pardons are inconsistent with the ICCPR as they create "a climate of impunity" and deny the victims the "right to a remedy" that exists in most international human rights instruments.[156] This is also evident in the UN Secretary-General's reports on the *Rule of Law and Transitional Justice in Conflict and Post-Conflict Settings* and the UN's *Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*.[157] Another resolution that supports the argument that amnesty is contrary to international law appears in the "Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law," adopted in 2005 by the UN Commission on Human Rights.[158] Some, such as Sadat, argue "a prohibition against the grant of blanket amnesties for the commission of *jus cogens* crimes may now have crystallized as a matter of general customary international law."[159] However, others note that international law "allows states some flexibility and discretion with respect to considering amnesties" for international crimes and gross violations of human rights.[160] Further, rather than refusing to support negotiations that include formal amnesties, negotiators often exhibit "strategic silence" regarding such amnesties.[161] In light of the many amnesties issued by states in times of crisis to perpetrators of crimes against

[155] Mégret 2016, 202.
[156] Mendez 1997, 259. For the former Legal Counsel to the United Nations, "This is why the Secretary General has consistently said that the UN can't foster, encourage, promote, or condone amnesties for international crimes, why the Security Council has said that these crimes must be excluded from any amnesty, and why international courts and tribunals have recognized that there is an emerging rule of international law that perpetrators of these crimes cannot be granted immunity from prosecution." O'Brien 2014.
[157] UN Doc. S/2011/634 (2011), para 12 ; UN Doc E/CN.4/2005/102/Add. 1 (2005), 14. For instance, principle 24 states that "even when intended to establish conditions conducive to peace agreement or to foster national reconciliation, amnesty and other measures of clemency shall be kept within the following bounds: (a) The perpetrators of serious crimes under international law may not benefit from such measures until such time as the State has met the obligations to which principle 19 [notably 'prompt, thorough, independent and impartial investigations of violations of human rights and international humanitarian law'] refers or the perpetrators have been prosecuted before a court with jurisdiction- whether international, internationalized or national – outside the State in question."
[158] As discussed in Schabas 2012, 183. UN Doc. E/CN.4/RES/2005/35, para 4: "[i]n cases of gross violations of international human rights law and serious violations of international humanitarian law constituting crimes under international law, states have the duty to investigate and, if there is sufficient evidence, the duty to submit to prosecution the person allegedly responsible for the violation and, if found guilty, the duty to punish her or him."
[159] Sadat 2006, 1022.
[160] Transitional Justice Institute 2013, 10 – 11.
[161] Vinjamuri 2017, 107.

humanity, Jackson argues that a duty to prosecute these crimes does not exist as part of customary international law. [162]

The adoption of new legal commitments did not, however, translate to significant shifts in state practice globally, as governments took few measures to hold individuals accountable for atrocities. Some important exceptions include the criminal trials of former authoritarian leaders, conducted mostly in Latin America and Eastern Europe, in the context of democratic transitions. While these trials were based in domestic law, and were accompanied by the establishment of truth commission and lustration laws, they were deemed to reflect increased acceptance by states of a need, or perhaps a duty, to hold human rights abusers accountable through both judicial and non-judicial mechanisms.

Yet, the general failure of states to uphold individual criminal accountability led to developments that in some ways point in a different normative direction than the emerging duty on states to investigate or prosecute. The parallel events of the end of the paralysis within the UN Security Council and the commission of mass atrocities in the former Yugoslavia and Rwanda in the early 1990s led to the creation by the UN Security Council of the ICTY and the ICTR in 1993 and 1994, respectively. These served as key precedents for a series of subsequent tribunals, including the International Criminal Court in 2002, the Special Court for Sierra Leone in 2002, the Extraordinary Chambers in the Courts of Cambodia in 2006, and the Special Tribunal for Lebanon in 2009.

The creation of a series of international tribunals since 1993 is evidence of a sense of collective responsibility to uphold the anti-impunity norm, when states are unable or unwilling to do so. These tribunals are indeed "emblematic of international resolve to ensure that those most responsible for crimes against the basic code of humanity do not escape punishment."[163] At the same time, these tribunals arguably undermine the normative imperative states have to investigate and prosecute crimes committed in their jurisdiction. More precisely, the ICTY and ICTR held primary jurisdiction over crimes committed in the former Yugoslavia and Rwanda, respectively, and did not defer to national jurisdiction. These tribunals thus reflect a move in a

[162] Though, Jackson nuances this position by arguing that if one distinguishes between amnesties granted in times of stability and in times of state emergency, customary international law does impose a duty to prosecute crimes against humanity "from which a small public emergency exception allowing derogation is carved." Jackson 2007, 120-121.
[163] Orentlicher 2007, 18.

different normative direction: enabling states to outsource cases to international courts while not necessarily undermining their duty to investigate and prosecute.

The ICC, as the only permanent court with much wider territorial jurisdiction than any other international tribunal, deserves particular attention. While there is a widespread view that the Rome Statute conclusively establishes a binding and universally applicable obligation for states to prosecute international crimes, in light of the Statute's preamble that "recall[s] that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes," it does not.[164] It is important to note that the Rome Statute does impose a duty on States Parties: the general duty to cooperate with the ICC, as stated in Article 86-93 of the Rome Statute and the ICC's Rules of Procedure and Evidence.[165] Yet, while the Rome Statute represents a major and remarkable step in the crystallization of the anti-impunity norm, the Rome Statute does not itself establish states' duty to prosecute international crimes. Unlike the ICTY and the ICTR, the ICC holds subsidiary, or "back-up" rather than primary jurisdiction, meaning domestic courts have priority to address the case. This is operationalized through the complementarity regime, an admissibility test that states that cases are admissible only if national courts are unable or unwilling to prosecute the same case. In order to successfully challenge the admissibility of a particular case, the state must show it has been, or is, genuinely investigating and prosecuting the same case for similar conduct. Yet, similarly to other tribunals, the ICC is based on an assumption that states do not investigate or prosecute these crimes and thus, in a sense, pushes in a similarly different normative direction: by not prosecuting, states can outsource their cases to international criminal courts while not necessarily undermining the anti-impunity norm. Seen in a different light, however, these two

[164] This preambular reference does not as such create a legal duty to prosecute since there is no "operative provision corresponding to this duty that would require states to prosecute individuals on this basis." Akhavan 2010, 1248. Further, its inclusion only in the preamble shows "that the parties had no intention to create an obligation to investigate and prosecute crimes within the Court's jurisdiction." Nouwen 2013a, 39.

[165] According to Article 86, "States Parties shall, in accordance with the provisions of this Statute, cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court." As supplemented by Part 9 and other articles in the Rome Statute and the ICC's Rules of Procedure and Evidence, the general obligation to cooperate with the ICC applies to a wide variety of the Court's activities, including enforcing ICC arrest warrants and surrendering accused persons to the Court as well as a broad range of other forms of assistance as outlined in Articles 93. According to Article 87(7), if States Parties fail to cooperate, the response available to the Court is to make a finding of non-cooperation and to refer the matter to the Assembly of States Parties or to the UN Security Council, in cases of UN Security Council referrals.

normative directions inherent within the norm can be reconciled under the conception of the anti-impunity norm presented at the beginning of this section: that it encompasses the responsibility of states to ensure that perpetrators of grave abuses are held criminally accountable, in either domestic or international jurisdictions. While the ICC is not the main institution through which the anti-impunity norm is enforced, it serves as a backup institution that helps create an international model that is not solely reliant on domestic courts.

In sum, the anti-impunity norm is enforced through a decentralized but interconnected system of accountability, composed primarily of domestic courts with international courts as subsidiary institutions.[166] Other important developments beyond the scope of this section include the increase in cases of states holding individuals accountable based on universal jurisdiction, the creation of a series of hybrid tribunals in regions across the world, and the development of regional instruments such as the Malabo Protocol. These treaties, declarations, and institutions presented in the abbreviated history above constitute a broader normative context that is marked by new expectations of how states and the international community should uphold fundamental values. Yet, the new multi-level system of international criminal justice leads to two versions of the norm: states have a duty to investigate and prosecute yet can outsource this duty to international courts. In this sense, within the Rome Statute system, states can adopt different versions of the norm to further strategic interests. Since the anti-impunity norm is marked by fragmented enforcement and features normative pulls both *for* and *against* the duty of states to prosecute, as mentioned above, this flexibility in the anti-impunity norm frames how the vagaries of politics surrounding its implementation remain a major force to be reckoned with.

Norms in Practice: Diffusion and Usage

The rapidly expanding pool of scholarly literature on norms, to which this thesis contributes, owes much to the first generation of scholarship, which emerged around the same time as the proliferation of international human rights treaties and mechanisms in the mid-1980s and early 1990s. Building on early research on norm socialization, scholars have since developed a variety of ways to understand the relationship between norms and state behaviour, with scholars placing different emphasis on the agents and factors that determine normative

[166] Sikkink 2011, 19.

change. This thesis contributes to a particular stream of scholarship that focuses on how actors use international human rights norms, which problematizes some of the assumptions of dominant ways of analysing norm diffusion.

The first wave of scholarship, seeking to explain how and why states were increasingly adopting certain international norms, focused on the agency of transnational human rights advocacy networks in promoting norms and shaping state behaviour. To model the socialization process of states, scholars offered several models, such as the "boomerang" model,[167] the "norm life-cycle" model,[168] and the norm diffusion "spiral" model.[169] These models share a view of normative change as linear and staged, fuelled by the "bottom up" and "top down" pressure by groups of rights promoters. For instance, in *The Power of Human Rights*, the spiral model identified three types of processes that influence non-compliant states to ultimately comply with human rights norms – instrumental adaptation, argumentation, and habitualization – which occur over different stages: repression, denial, tactical concessions, prescriptive status, and rule-consistent behaviour.[170] These models view norms as defining a "logic of appropriateness" that "play a central role in shaping the choices and actions that constitute a political order," and thus emphasise that "principled ideas and arguments often animate" state actions.[171] Through sustained mobilization by human rights activist groups and international actors, norm-violating states change their behaviour and over time internalize the norm. The model does acknowledge elite strategy, though this is limited to how norm-violating states make tactical concessions, such as releasing a few political prisoners, as a step on the longer road to norm internalization.

While these early models were assumed to explain norm diffusion in a wide variety of contexts, subsequent scholarship underscores the importance of taking into account how certain conditions make the pressure of pro-rights groups more or less effective, and thus shape states' move from commitment to compliance. In the follow-up edited volume *The Persistent Power of Human Rights,* the same authors note that limited statehood, weak institutional capacity, the nature of governments, the degree of dependence on trade and aid flows, and the degree of popular support are all important factors in influencing domestic compliance with

[167] Keck and Sikkink 1998
[168] Finnemore and Sikkink 1998
[169] Risse, Ropp, and Sikkink 1999.
[170] Risse, Ropp, and Sikkink 1999.
[171] Snyder and Vinjamuri 2004, 7.

human rights norms.[172] In a similar vein, Bass highlights how the liberal or anti-liberal nature of the government determines support for the establishment of international tribunals to try grave abuses.[173] Further, as surveyed by Hopgood, Snyder, and Vinjamuri, scholars have so far found various correlations between pressure by pro-rights groups and human rights outcomes.[174] Key determining parameters include, among others, whether the country has ratified rights treaties, the degree of democracy, the strength of local human rights activists, and whether third parties echo calls by pro-human rights groups and simultaneously pressure states to comply.[175] Sharing a focus on the agentic power of pro-rights groups, these studies expect less from simply the persuasion power of international norms to shape state behaviour and take into account 'real world' conditions and parameters.

The wide variety of studies that build from the aforementioned models have generated rich findings, yet their approach arguably leaves out crucial parts of the norm diffusion story. While they emphasise the importance of features of the domestic political landscape, such as the institutional capacity or the strength of local human rights activism, these studies do not give enough explanatory value to other key features of the domestic political landscape: the role of power, strategic elite interests, and power relations between political actors. A different stream of scholarship, to which this thesis contributes, analyses how local actors can strategically appropriate and use norms for various purposes and enables research into the use of international norms. The value of this perspective is that, by injecting "a healthy dose of domestic politics" into our understanding of norms, it can shed light on how actors engage in bargaining and strategic calculation around whether to change their behaviour in accordance with the norm.[176] These studies explore "conditional incentives, political bargaining, and investment in enforcement institutions as precursors to the emergence of rights."[177] Reflecting their cost-benefit analysis, as Schimmelfennig explains, actors "manipulate the norms strategically to avoid or reduce the costs of socialization, […] use and interpret international norms to justify their self-interested claims, and frame their preferences and actions as norm-

[172] Risse, Ropp, and Sikkink (eds) 2013.
[173] Bass 2000.
[174] Hopgood, Snyder, and Vinjamuri 2017.
[175] Clark 2013; Simmons 2009; Neumayer 2005; Murdie and Davis 2012; Kim 2012.
[176] Subotić 2009, 28-29.
[177] Hopgood, Snyder, and Vinjamuri 2017, 16. For studies on the instrumental use of international norms, see, for instance, Schimmelfennig 2001; Schimmelfennig 2005; Hurd 2005; Hafner-Burton and Tsutsui 2007; Hafner-Burton, Tsutsui, and Meyer 2008; Hafner-Burton 2013; Cardenas 2007.

consistent."[178] This approach focuses on the influence of the interests of actors and assumes that actors' behaviour in the socialization process is motivated extrinsically by their political preferences, namely material and power-oriented benefits, rather than a function of the internalized 'oughtness' of the norm.[179] Norms are thus seen as "spontaneously evolving, as social practice; consciously promoted, as political strategies to further specific interests; deliberately negotiated, as a mechanism for conflict management; or as a combination, mixing these three types."[180]

This perspective also adopts a different framework to interpret how actors change their behaviour in response to a norm. It goes beyond focusing on whether actors take measures in support of the norm, such as the adoption of new institutions, laws, or changes in public discourse, and explores the various interests behind such changes as well as whether or not the change in behaviour actually supports or undermines the norm's normative substance. This perspective shares the assumption with the aforementioned approaches that normative progress, such as increased respect for human rights, can happen through pressure and coercion. Yet, it is different from studies that emphasise how actors' changed behaviour reflects their internalization of the norm and their newly changed views and interests, or is a function of reforms or changes within the domestic context. This perspective rather assumes that taking measures in conformance with the norm does not necessarily reflect internalization of the norm and can happen with or without internalization. It instead explores the strategic interests for, and effects of, the norm's usage. In other words, these studies do not strictly explore whether actors take measures in support of the norm but rather how and why they do so.[181]

Yet, within this pool of studies that study how actors use norms in domestic political struggles, it is not clear what it is about norms, defined as "a standard of appropriate behaviour for actors of a given identity,"[182] that render them capable of serving as resources. To help answer this question, this thesis contributes to this field by offering a new way to analyse norms through the concept of norm exploitation. A classic conception is that norms are composed of

[178] Schimmelfennig 2005, 830.
[179] Schimmelfennig 2005, 830. For instance, applied to the socialization of states in Central and Eastern Europe, Schimmelfennig argues their conformance to liberal norms is a function of international incentives (EU and NATO membership) and whether confirming to liberal norms would be costly in light of the constellation of domestic parties.
[180] Katzenstein 1996, 5, 21.
[181] Subotić 2009, 7.
[182] Finnemore and Sikkink 1998, 891.

a tripartite structure, composed of a problem, a value, and a behaviour.[183] Another conception is that of a composite norm, or a "complex ideational structure, composed of different sub-norms and normative elements."[184] Yet another conception, as proposed by Winston, is that of a norm cluster, or "a bounded collection of interrelated specific problems, values, and behaviours that are understood to be similar enough that their adopters form a family group."[185] Focusing less on the substantive meaning of the norm, this study suggests a more mechanistic conception of norms, which sees them as characterised by their structural features of how they are enforced as well as the functions they play. As illustrated in the following chapters, norm exploitation offers a new conceptual tool for the study of norm usage that can apply beyond the anti-impunity norm.

The Anti-Impunity Norm in Practice

The growing stream of scholarship that explores the strategic use of the anti-impunity norm complements the dominant approach to exploring the emergence of the anti-impunity norm and its domestic, regional, and international institutions. Viewing international law as a regulative rule, "act[ing] on international relations and upon political subjects through restraint and regulation,"[186] studies within the mainstream approach tend to use quantitative large-n methods to test hypothesised causal relations between implementing anti-impunity measures with measurable outcomes, including the rate of abuses, the rate of hostilities, and levels of democratization and of the rule of law. The wide range of findings identify various relations between, for instance, the pursuit of justice and conflict termination: some find that it helps, others find that it harms, while others find it only has marginal effects.[187] While shedding valuable light on patterned effects across space and time, these cross-national findings are limited in their ability to explain how anti-impunity measures led to such outcomes in detail, as they are based on a reasonable but presumed causal relations, and risk overestimating the

[183] Winston 2018, 640.
[184] Paddon Rhoads 2016, 28. Paddon Rhoads analyses the norm of impartiality in peacekeeping as composed of a principle dimension and a procedural dimension.
[185] Winston 2018.
[186] Kinsella 2010, 164.
[187] See, for instance, Simmons and Danner 2010; Greig and Meernik 2014; Gissel 2015; Broache 2016; Prorok 2017; Mendeloff 2017; Loyle and Binningsbø 2018; Dancy and Wiebelhaus-Brahm 2018.

impact of anti-impunity measures by obscuring the role of political contextual factors in which such measures are implemented, such as the role of elite objectives, the particular political profile of the accused in national trials, the type of amnesties, and the quality of the trials.

To deepen and diversify these scholarly findings, this study joins others that use in-depth qualitative case study methods that compare the presumed causal mechanisms with actual behaviour. These studies argue that transitional justice processes, including the implementation of judicial and non-judicial mechanisms, should be examined not as inherently stabilising or destabilising but rather as sites of political contestation. By extension, rather than viewing the anti-impunity norm as a rule that is in opposition to political power and as a doctrinal whole that guides actors and practices, these studies view the norm as one of the legal resources that "are useful, and powerful, instruments in the process of 'sense-making' for states"[188] and examine "how international law is used, what it means, and what it replaces."[189] At the same time, this thesis does not assume that states' engagement with the anti-impunity norm for strategic purposes and the alignment between judicial measures and elite interests as inherently normatively objectionable and evidence of the *misuse* of international criminal law. Assuming that the integration of law within political strategies should not necessarily be seen as *abuse* of law, this thesis adopts the original meaning of the term "lawfare" as a value-neutral concept, as whether law should be used as a weapon during conflict or not is a matter of debate rather than consensus.

Scholars have identified a variety of objectives for which actors implement anti-impunity measures such as creating new investigatory bodies, holding human rights trials nationally, requesting the opening of investigations by international tribunals, cooperating with international tribunals…[190] In contrast to the desirable aims of transitional justice, namely justice, truth-seeking, and reconciliation, scholars have noted how such measures can be used to appease international pressure in order to gain material and reputation benefits, to weaken internal challengers, to promote a particular narrative of the conflict, and even to prepare a return to war. For instance, both Lake and Cronin-Furman argue that elites in conflict-affected states instrumentalize postconflict accountability institutions for strategic aims by maintaining

[188] Hurd 2015, 34.
[189] Hurd 2013, 40.
[190] While this thesis focuses on how elite actors use the anti-impunity norm, norm usage is of course available other actors, such as civil society groups and armed opposition groups. For instance, Hansen and Sriram (2015, 47) consider how civil society has use and transform norms such as the anti-impunity norm.

an outward appearance of supporting the institutions while undermining their effectiveness and independence and, more broadly, the spirit of the anti-impunity norm. Lake highlights the pursuit of objectives internal to the country, arguing that elites manipulate the justice system to remove challengers who had lost the support of their superiors, surrender dissidents in exchange for access to illicit resources, and to rally troops for insurgency, while Cronin-Furman places more emphasis on the elites' establishment of ineffective institutions in order to avoid external costs such as the potential reduction in foreign military or development aid.[191]

Turning towards the interaction between national authorities and international courts, various studies argue that states can instrumentalize the ICC's intervention to weaken their opposition, both militarily and reputationally, and strategically avoid scrutiny into the conduct of state forces.[192] Others, such as Peskin and Boduszynski, argue that international actors such as the members of the UN Security Council instrumentalize the ICC as a potent diplomatic tool.[193] Several scholars of transitional justice in the Balkans argue that national elites in Serbia, Croatia, and Bosnia, responding to international pressure to prosecute abuses, instrumentalized transitional justice processes in various ways to gain advantages in localized political contests and to secure benefits, including aid and international membership into the European Union, thereby changing their behaviour but for ulterior political motives.[194] Exploring both judicial and nonjudicial transitional justice mechanisms, Leclercq, MacDonald, and Loyle and Davenport argue that, in light of the differences between the priorities of national and international actors, national authorities in Burundi, Uganda, and Rwanda, respectively, created transitional justice mechanisms but adopted subversion techniques that led to various types of injustice, including temporary immunities and biased justice.[195] Within this literature, scholars take different views on whether or not the strategic use of justice represents a highly problematic subversion of the norm's normative substance itself. In other words, scholars may agree with Subotić's argument that the domestic use of international norms is an inevitable part of norm diffusion, but not all further agree with the related argument that the use of the norm to achieve goals that are fundamentally different from the norm's purpose is normatively

[191] Lake 2017; Cronin-Furman 2015.
[192] Branch 2007; Nouwen and Werner 2011; Rodman 2014; and Clark 2018.
[193] Peskin and Boduszynski 2016.
[194] Subotić 2009; Peskin 2008; Grodsky 2009. Lamont 2010; Peskin 2008.
[195] Leclercq 2017; MacDonald 2019; Loyle and Davenport 2016.

problematic and seriously damaging to the norm itself.[196] Others seem to suggest that this divergence is inevitable but not damaging to the norm itself.[197]

The Anti-Impunity Norm and Legitimation

Interestingly, a common thread that links many studies on the strategic use of justice is the idea of legitimation, or that the pursuit of justice can build legitimacy. As addressed in Chapter 1, adopting anti-impunity measures is often expected to increase the legitimacy of governments. Indeed, integral to the aforementioned shift towards "sovereignty as responsibility" is the view that the legitimacy of governments is contingent on their being minimally just towards their citizens. The strengthening of the anti-impunity norm forms part of the new "legitimation environment" in which states are under increased pressure to justify their decisions and account for their conduct towards their citizens, including upholding the imperative of holding individuals accountable for grave abuses.[198] This link between curbing impunity and government legitimation stems from two normative developments as part of the contra-sovereignty *zeitgeist*. First, it emerged from the development of transitional justice in the aftermath of democratic transitions from authoritarian regimes, particularly in Latin America. Early expressions were seen at the national level, starting in the 1970s with human rights trials in Greece and Portugal, as well as a series of trials in Latin America, with the most prominent being the 1985 trials of the junta in Argentina.[199] One of the main objectives of transitional justice measures was to legitimise the new regime and delegitimise the old regime, as "[n]ational prosecutions legitimate a new government in a post-transitional situation, being a prime indicator of support for the rule of law"[200] and as "failure to enforce the law may undermine the legitimacy of a new government."[201] This notion was reinforced by the report of the International Commission on Intervention and State Sovereignty (ICISS) in 2001, which also introduced the Responsibility to Protect (R2P) principle, and later echoed in a report approved unanimously by the UN General Assembly in 2005.[202] Capturing this presumed link,

[196] Subotić 2009.
[197] See, for instance, Bell 2017.
[198] Broomhall 2003, 5. Teitel 2011, 11. Weller 2002, 693.
[199] Sikkink and Kim 2013, 275.
[200] Roht-Arriaza 1995, 4.
[201] Orentlicher 1991, 2543.
[202] UN Doc. A/RES/60/1 (2005), para 138.

Akhavan writes, "with effective enforcement, tribunals can contribute to the long-term transformation of the boundaries of power and legitimacy."[203]

Within the expanding scholarship on why and how governments engage in the 'fight against impunity,' scholars highlight a number of ways in which the adoption of anti-impunity measures can contribute to the legitimation of government. Yet, by exploring the strategic objectives, selectivity, and effects of doing so, they problematize the presumed relationship between pursuing transitional justice and the legitimation of government - that establishing anti-impunity measures can legitimate governments through the display of its commitment to the rule of law and holding individuals accountable for grave abuses. However, as pointed out below, scholars often refer to implicit criteria for legitimacy and do not explicitly define the criteria of legitimacy, thereby reflecting and reinforcing the slipperiness of the concept.

Exploring accountability measures taken by domestic elites at the national level, several studies note that condemnation and prosecution boost aspects of the government's legitimacy, though not necessarily by reflecting a genuine commitment to human rights. Loken, Lake, and Furman argue that, in Sri Lanka, domestic elites selectively condemned and prosecuted perpetrators of wartime rape as a "strategic legitimacy-building practice adopted for military ends," as it was used to garner political legitimacy at the national level. More specifically, invoking human rights law helped boost two criteria of legitimacy - rightful governance and territorial control – as it allows them to "convey moral superiority in their commitment to defending women" and signals that they "are materially more capable of offering protection and punishing perpetrators of violence."[204] Promoting anti-impunity thus "allows them to stake claim on the monopoly of the legitimate use of violence, while simultaneously demonstrating that they can follow through on a law-and-order platform capable of protecting civilian populations from harm."[205] In a cross-national study, Dancy and Wiebelhaus-Brahm find that conducting trials of opposition groups can boost government legitimacy, premised on the criteria of legitimacy as law-abiding, as weakening adversaries through courts is more legitimate than through violence. Trials represent a "milder, more internationally legitimate form of leadership decapitation. Rather than killing them, governments can arrest their adversaries, hold trials, and enjoy the benefits of legal legitimation."[206]

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[203] Akhavan 2009, 629.
[204] Loken, Lake, and Furman 2018, 754.
[205] Loken, Lake, and Furman 2018, 761.
[206] Dancy and Wiebelhaus-Brahm 2018, 51.

In a similar vein, scholars have noted how domestic elites establish anti-impunity measures in order to maintain their legitimacy as a supporter of international human rights, especially in the face of international pressure to do so, but in parallel manage the scope of these measures to mitigate any costs of doing so. For instance, Cronin-Furman argues that authorities often establish "quasi-compliant" institutions in order deflect international censure for failure to abide by the global accountability norm while also not genuinely upholding the norm.[207] Similarly, MacDonald illustrates how authorities in Uganda displayed cosmetic endorsement of the anti-impunity norm in order to gain international validation and funds, while carefully managing the process to placate the pressure of delivering substantive transitional justice.[208] This is also noted in Burundi, where authorities expressed commitment to the rule of law while stalling actual progress on transitional justice and thus "succeeded in deceiving the international community."[209]

Going beyond bolstering the government's legitimacy, elites can strategically engage with transitional justice measures to influence the status of the state itself. For instance, Subotić notes how both domestic and international actors in Bosnia used transitional justice to strengthen state institutions and weaken the Republika Srpska, in order to boost the legitimacy of a unitary and centralized Bosnian state. In Croatia, elites instrumentally complied with international transitional justice institutions "primarily to obtain international legitimacy for Croatia as a European state while keeping domestic norm resisters marginalized and too weak to successfully mobilize against adoption of transitional justice."[210]

Further, scholars highlight various ways in which measures taken by states and the ICC within the Rome Statute system can serve strategic ends and shape government legitimacy. An influential article by Simmons and Danner argues that states strategically ratify the Rome Statute in a bid to bind themselves in order to credibly signal their intention to ratchet down violence and refrain from using criminal means in fight insurgents.[211] In doing so, it entails domestic audience costs and raises expectations among the population that the government is seeking non-military solutions and thus, if the government continued to commit crimes, civil society mobilization against the regime. While Simmons and Danner do not explicitly mention

[207] Cronin-Furman 2015.
[208] MacDonald 2019.
[209] Subotić 2009, 180.
[210] Subotić 2009, 12.
[211] Simmons and Danner 2010.

the word "legitimacy," it is implied that failing to meet the expectations can erode the government's legitimacy vis-à-vis its domestic constituency, premised on the criteria of refraining from committing criminal violence.[212]

Questioning the idea that states self-refer to the ICC to bind themselves and operationalize their genuine commitment to human rights and the rule of law as a sign of their legitimacy, Clark suggests that authorities in the Democratic Republic of Congo may have self-referred to the ICC "simply to gain international legitimacy by being seen to be cooperating with the ICC." This presumes a definition of legitimacy as appearing as a supporter of international human rights norms in the eyes of the international community, even if the government's actions do not necessarily exhibit rule-consistent behaviour. Presuming a similar definition of legitimacy, Nouwen and Werner argue that Uganda's self-referral to the ICC and the subsequent ICC arrest warrants against the Lord's Resistance Army (LRA) framed the Ugandan government as a "legitimate government" and made Ugandan officials "feel legitimized by the absence of ICC proceedings" against Ugandan state actors, despite allegations against Ugandan forces.[213] Exhibiting cooperation with the ICC "led to an impression of friendship with the Court, which boosted its international legitimacy."[214] Accordingly, Nouwen and Werner highlight the dual usage of the ICC: to frame the government as a friend of the international community and to transform its enemy, in this case the LRA, "into an enemy of mankind."[215] Branch notes another advantage gained from appearing as a supporter of international human rights norms in the eyes of the international community: deflecting international scrutiny and pressure regarding its human rights abuses and gaining international support for its military campaign against the opposition.[216] This is similar to what Subotić notes in the Balkans, that domestic elites can "obtain an international shield of legitimacy for continuing justice impunity at home."[217]

In a study on how international tribunals can influence the likelihood that quasi-state entities successfully gain statehood status, Dijxhoorn similarly argues that that governments use the narratives of war crimes and crimes against humanity to boost their legitimacy, while simultaneously delegitimising its opponents. Accordingly, governments issue self-referrals to

[212] Rodman and Booth 2013, 275.
[213] Nouwen and Werner 2011, 950-951.
[214] Nouwen and Werner 2011, 962.
[215] Nouwen and Werner 2011, 962.
[216] Branch 2007, 184.
[217] Subotić 2009, 188.

the ICC based on a cost-benefit analysis of whether involving the ICC could further their strategic goals and create critical legitimacy challenges for their opposition. In addition to a generic definition of legitimacy ("a generalized perception or assumption that the actions of an entity are desirable, proper, appropriate within some socially constructed system of norms, values, beliefs, and definitions"), Dijxhoorn focuses more specifically on one criterion of legitimacy: being seen to be a supporter, rather than a violator, of fundamental human rights.[218]

Other studies note how domestic elites draw upon the anti-impunity norm to shape broader narratives about the conflict in ways that boost their legitimacy, or the reasons leaders rely on to justify their political authority. For instance, in a study on Libya, Boduszynski and Wierda argue that former anti-Qadhafi revolutionaries selectively pursued justice as part of a "broader – and now violent – struggle for legitimacy and power in the new Libya." Presuming a definition of legitimacy as having won "a heroic battle against a tyrant," selective justice arguably served as a tool to bolster these groups' "revolutionary legitimacy" in the "intense post-Qadhafi battles between different political camps and notions of legitimacy."[219] Similarly, Miller argues that national elites in Rwanda mobilised the discourse of the anti-impunity norm in part "to consolidate power, assert authority, and establish legitimacy."[220] Miller identifies three bases for the government's legitimacy: having "saved the country from the scourge of genocide," being "the representative of the long-oppressed Tutsi," and having "fulfil[led] the requirements of the internationally-sanctioned Arusha Accords."[221] The Rwandan government, according to Miller, engaged in the fight against impunity "to solidify the authority and legitimacy of the government as not only a voice for victims but a protector of the rule of law" and to further a particular narrative of the conflict. Rather than having its legitimacy undermined as a result of instrumentalising the discourse of international justice for particular aims, as some warned, "the RPF's skilful deployment of anti-impunity discourse, including at the national level, allowed it to win and retain that very legitimacy."[222] While valuable to the study of Rwanda, these tailored criteria of legitimacy are nevertheless limited in their applicability to other contexts.

[218] Dijxhoorn 2017, 186.
[219] Boduszynski and Wierda 2017, 142-143; Wierda 2015, 123.
[220] Miller 2017, 151.
[221] Miller 2017, 155.
[222] Miller 2017, 166.

Overall, the relationship between anti-impunity and legitimation remains a conceptually weak link, as authors rarely explicitly theorize the criteria for legitimacy that upholding the anti-impunity norm is purported to shape and assume the reader understands exactly how and on what criteria the legitimation occurs. Scholars within the same pool of studies thus often use the same term to refer to different ideas. Perhaps in response to this, one scholar identifies as a gap in the literature on the legitimating effects of international criminal law and points to "the task of illuminating its precise mechanics as an avenue for future research." [223] The framework presented in the next chapter offers a widely-applicable conceptual structure that can help build a more coherent and comprehensive understanding of this relationship.

The cases of Côte d'Ivoire and Mali are particularly well-suited to further knowledge in this field. The politics of conflict-related justice in both countries have not been sufficiently studied, neither by scholars of international justice nor by scholars of the Ivorian and Malian conflicts. Of the few studies that directly address Côte d'Ivoire and Mali's conflict-related justice proceedings, their analysis is quite limited. Côte d'Ivoire appears as one of several cases examined in studies on the ICC's prosecutorial selectivity, yet the analysis is limited to emphasising the rather obvious point that the cases against the Gbagbos reinforces victor's justice.[224] By extension, several scholars have focused on the dynamics of resistance to such one-sided prosecutions, contributing to broader literature on the backlash against human rights processes.[225] Several authors dissect the ICC case against Al Mahdi, yet focus solely on the legal procedural aspects of this unprecedented case rather than the anti-impunity norm's role in the conflict.[226] Further, Dijxhoorn also addresses the ICC's impact on the Malian conflict, yet Mali is addressed as one of three case studies and the analysis, based mostly on secondary sources, is limited to the government's engagement with the MNLA - only one of many active armed groups that have been accused of committing abuses.[227] This thesis also pushes forward

[223] Sander 2018b, 26.
[224] Tiemessen 2014; Malewa 2015; Hillebrecht and Straus 2017.
[225] Jones 2017; Adou 2019.
[226] Martinez 2015; Ellis 2017; Casaly 2016.
[227] Dijxhoorn 2016; Grovogui 2015, 116-119. Exceptionally, as one of three case studies along with Libya and Guinea, Grovogui critically examines the implication of the ICC in the politics of the Malian conflict and argues that the Malian government's self-referral undercuts the court's investigatory prerogatives by increasing the likelihood its investigations focus only on the government's opposition.

the rather narrow empirical basis for scholarly analysis on the phenomenon of self-referrals, which mainly draws on the self-referrals by Uganda and Democratic Republic of Congo.

Further, while scholars of both conflicts, a pool dominated by Francophone scholars, highlight impunity as one of the causes of the conflict, they rarely explore the matter in detail. Regarding Côte d'Ivoire, Charbonneau, Banégas, and Piccolino all highlight grievances around impunity as a key challenge facing Ouattara's administration, though they do not develop this theme in detail.[228] McGovern does explore how politicians and diplomats instrumentally invoked accusations of human rights abuses, this analysis is limited to the period between 2002 and 2006.[229] Regarding Mali, scholars including Sangaré, Benjaminsen and Ba, as well as Guichaoua and Pellerin all highlight frustration against impunity, especially for state-affiliated actors, as among the main fundamental grievances that foment anti-state mobilisation and spur involvement with jihadist groups.[230] Yet, beyond mentioning its importance as a source of anti-state mobilisation, the academic literature on the Malian conflict does not explore the issue of impunity for abuses in depth.

Conclusion

After zeroing in on the anti-impunity norm, this chapter then reviewed scholarly approaches to understanding the mutual feedback between norms and state conduct and underlined the value of analysing norms as a resource that can become useful in the strategic competition not only among states, as other have explored, but also within states.[231] More broadly, many studies on the use of norms, especially those focused on the anti-impunity norm surveyed above, highlight how actors' usage of norms to pursue specific political agendas can undermine the substantive content and 'spirit' of the norm itself. Yet, as explored in the next chapters, the usage of norms is not inherently normatively 'bad,' as implementing norms is commonly seen as having purpose, ranging from promoting peace, truth, reconciliation, or

[228] Articles that mention the dilemma between justice, security, and reconciliation, without exploring it in much detail, include Charbonneau 2013; Banegas 2011; Bassett 2011. Piccolino 2018. Exceptionally, Bovcon and Malu explore the question of justice in more detail. Bovcon, 2014; Malu, 2016.
[229] McGovern 2010.
[230] Sangaré 2016; Benjaminsen and Ba 2018; Guichaoua and Pellerin 2018. See also Wing 2013; Ursu 2018.
[231] Hurd 2005.

other goals. It rather depends on critically exploring how, why, and to what effects actors take measures in relation to the norm.

The conceptual framework and empirical material presented in the following chapters fills gaps in the literature surveyed above by offering answers to several questions: What is it about norms that make them useful resources? What is it about the anti-impunity norm specifically that makes it a resource in internal conflict? How can we more clearly understand the ways in which using the anti-impunity norm influences government legitimacy during conflict? How can studying the ways in which actors engaged in the 'fight against impunity' in Côte d'Ivoire and Mali further scholarly understanding of the new normative environment of the age of accountability?

Chapter 3: Norm Exploitation - A Conceptual Framework

"The concepts and structures of international law…are the conditions of possibility for the existence of something like a sphere of the 'international' as one for asserting and contesting political power, making and challenging claims of right and legitimacy that may be analysed as claims about legal justice. If international law did not exist, political actors would need to invent it."

–Martti Koskenniemi, *From Apology to Utopia*[281]

Introduction

Responding to the call to inject "a healthy dose of domestic politics"[287] into our understanding of the anti-impunity norm, the framework presented below offers a more refined and widely-applicable lens through which to analyse how and why norms become a resource in political contestation and, more specifically, how and why the anti-impunity norm can serve as a resource in actors' legitimation strategies during conflict. In shifting from a norm-as-rule lens to a norm-as-resource lens, it helps us better study "the way in which actors mobilize it, in whose interests, and with what assumptions, goals and consequences."[288] In doing so, it offers a way to study the co-constitution of law and politics and the "real world" conditions in which the anti-impunity norm operates.

As opposed to the dominant pool of studies that analyse the pursuit of justice for grave crimes as the *application* of the anti-impunity norm in practice, a richer way of studying this phenomenon is analysing the *exploitation* of the anti-impunity norm. Importantly, the term 'exploitation' is not pejorative, as its common meaning suggests. Rather, the concept of *norm exploitation,* as coined here, is value-neutral. Exploitation refers specifically to usage. It does not imply that actors necessarily use the norm to further an outcome that undermines the spirit of the norm itself, namely holding individuals accountable for grave abuses – though it does

[281] Koskenniemi 2006*,* xiii.
[287] Subotić 2009*,* 28.
[288] Leclercq 2017, 529.

not exclude this possibility. In other words, it does not presume anything is normatively undesirable in the actors' objectives nor the outcomes of using the norm.

It offers a sharper lens through which to analyse actors' usage of a norm by arguing that it is a function of three factors: the *elite strategy*, the norm's enforcement *features,* and the norm's *functions*. Applied to pursuing justice in internal conflicts, it reveals how the implementation of the anti-impunity norm is the product of how elite actors capitalise on the norm's features and functions to further a particular objective in the context of internal conflict. It allows for critical evaluation of how actors use the opportunities presented by the states' relative centrality in the norm's enforcement but also by how the norm's functions overlap with the basic criteria for government legitimacy. This framework thus enables inquiry into the political power of international law, including "the use of law and legal resources in strategies of legitimation and delegitimation, by states and by non-state actors."[289] More broadly, applicable to the study of norms in general, the concept offers a tool to observe in a more granular way how a norm can be strategically implemented by elite actors in the context of domestic political contestation and thereby explore "the use that is made of it by the actors in a space of strategic struggle."[290]

This chapter proceeds in several steps. First, it shows how to conceptualise elite strategy. Second, it presents how the norm's enforcement features allow state actors to play a relatively central, though not entirely unconstrained, role in its enforcement. Third, it outlines the anti-impunity norm's functions and illustrates how they overlap with basic criteria of legitimacy, making it a relevant resource in strategies of legitimation and delegitimation. This framework is then applied to the case studies of Côte d'Ivoire and Mali in the four subsequent chapters.

Elite Strategy

As mentioned in Chapter 2, a review of the literature on during-conflict accountability reveals that much literature overlooks how the politics at both domestic and international levels shape the parameters of the landscape of accountability and impunity.[302] Those scholars that

[289] Hurd 2016, 99 – 100.
[290] Legrand (2007) cited in Leclercq 2017, 528.
[302] Vinjamuri and Snyder 2015, 309.

do explore the role of politics have noted, in transitions from authoritarian and conflict-affected settings, that the "balance of political forces" both during and after the end of conflict is a fundamental factor in explaining the choice of anti-impunity measures and how actors implement the anti-impunity norm.[303] Since holding those most responsible for international crimes often involves individuals with significant political and military influence, it is critical to analyse the political profile of those accused of bearing criminal responsibility. Indeed, in conflict-affected contexts, the way in which elite state actors invoke and implement "justice" is arguably based on an assessment of how they should engage with their opposition in order to gain an advantage towards achieving their objectives. Thus, this framework incorporates the *perceived political value* of the accused as a very important element in understanding how elite actors craft the parameters of accountability and impunity.

As coined here, the perceived political value of a given individual, which can be assessed as 'high' or 'low,' refers to the extent to which that interlocutor is deemed crucial to arriving at a particular political settlement that is on the government's terms. Relatedly, an individual's perceived political value takes into account their potential to spoil the peace, as their value is intrinsically linked to the balance of power between the government and the interlocutor. Borrowing Stedman's definition, spoilers are "leaders and parties who believe that peace emerging from negotiations threatens their power, worldview, and interests, and use violence to undermine attempts to achieve it." [304] Stedman states that spoilers "exist only when there is a peace process to undermine, that is, after at least two warring parties have committed themselves publicly to a pact or have signed a comprehensive peace agreement."[305] Yet, individuals can also derail, or spoil, less formal negotiations prior to public commitment or signing of a pact or agreement. Taking a broader lens, this thesis thus explores how an individual's perceived political value influences how state actors address their alleged responsibility for abuses in conflictual settings even prior to a formal agreement.

Assessing the perceived political value of a given interlocutor thus takes into account whether the individual can spoil peace through their destructive capacity, based on the relative number of fighters or weapons they have. An individual with significant power is likely deemed highly valuable to achieving a particular outcome if their power enables them to spoil and derail

[303] Sieff and Vinjamuri Wright 1999, 760. See also Huntington, 1991; Bass 2008, 237 – 238; Freeman 2010, 23; DeTommaso, Schultz, and Lem 2017.
[304] Stedman 1997, 5.
[305] Stedman 1997, 7.

efforts to do so. Similarly, an individual with low power is likely deemed less valuable to achieving a particular outcome, as their weakness precludes them from spoiling efforts to do so. Beyond destructive capacity, it is also relevant to take into account whether excluding the individual from the political settlement would jeopardize it. For instance, a given interlocutor may not be necessarily militarily strong but can nevertheless be deemed highly valuable as they represent an important constituency that should be included even if they are not militarily dangerous, and excluding them from the political arrangement would jeopardize the settlement. Assessing the perceived political value of key actors is crucial across types of conflicts, as there is exclusion and inclusion of actors in both one-sided victories and negotiated settlements. Rather than static, perceived political value is fluid and can shift over time. In light of changing conflict dynamics within the same conflict, a given actor can shift from having high to low perceived political value, and vice versa, by gaining or losing leverage, constituencies, or armed backing. In other words, rather than assume conflict dynamics are over once a military victory is achieved or a peace agreement is signed, conflictual dynamics between groups – as well as deals, negotiations, and bargaining - span into post-crisis periods as well.[306]

This framework thus offers a concept that helps understand how the level of national elite support for anti-impunity measures is often linked to a calculation concerning whether such measures would further or block their objectives. In terms of supporting accountability, measures include supporting impartial and independent investigations and prosecutions, enforcing national arrest warrants, issuing referrals to the ICC and subsequently cooperating with the ICC, and otherwise supporting judicial processes. In terms of obstructing accountability, measures include issuing formal amnesties, lifting of arrest warrants, and releases of individuals accused of international crimes, refusing to enforce national arrest warrants, refusing to cooperate with the ICC, and otherwise weakening judicial institutions. Exploring cases that both do and do not go forward through the legal system reveals how judicial institutions in the uncertainty of conflict-affected contexts can be navigated by elites in pursuit of conflict-related ends.[307] This view treats both the support and obstruction of criminal accountability as part of the anti-impunity norm's dynamic implementation in practice.

[306] Lake 2017, 6.
[307] Lake 2017, 9.

Investigating elite strategy thus examines both actions and policies adopted as well as intent. Determining the "true" intent of a government is of course challenging as it is "impossible to enter into an actor's head and know conclusively its motivations."[308] Nevertheless, it is possible to analyse elite strategy and motivation, as well as the perceived political value of interlocutors, including by carefully analyse contextual factors and an array of sources. In addition to elite interviews, these include official statements by governments, regional organisations, the UN Security Council, and key states, such as France in the cases of the Ivorian and Malian crises, as well as from conduct that is not explicitly explained in official statements but rather exhibited through consistent elite behaviour. Overall, considering these factors responds to a call by scholars "to take political context into account in assessing the causes and consequences of justice efforts" since international criminal justice involves politics "at every step."[309]

The Norm's Enforcement Features

Analysing the norm's implementation as a process rather than a rule, embedded within the context of political contestation in times of internal armed conflict, requires grappling with the practical realities of how the norm is enforced. The anti-impunity norm developed not exclusively as a move against, away from, and above the state but rather built on the "volcano" of state sovereignty.[310] As a result, the norm is anchored within the dual nature of the state within the international criminal justice system: the state is both a subject and agent of the anti-impunity norm. While the norm imposes expectations and limitations on state actors, including potentially targeting state or state-affiliated actors for criminal accountability (state as subject), state actors play a central role in institutionalizing and implementing the norm (state as agent). The states' relative centrality in the norm's enforcement enables governments to maintain a

[308] Hurd 1999, 382.
[309] Vinjamuri and Snyder 2015, 320.
[310] Cassese 1998, 11-12 citing Niemeyer, 1932 *Einstweilige Verfugungen des Weltgerichsthofs, ihr Wesen une ihre Grenzen.* Cassese explains that Niemeyer meant "that whenever state sovereignty explodes onto the international scene, it may demolish the very bricks and mortar from which the Law of Nations is built. It is for this reason that international law aims to build devices to withstand the seismic activity of states: to prevent or diminish their pernicious effects. This metaphor is particularly apt in relation to an international tribunal. The tribunal must always contend with the violent eruptions of state sovereignty: the effect of states' lack of cooperation is like lava burning away the foundations of the institution."

certain *marge de manoeuvre* in navigating the flexibility within the anti-impunity norm and determining its (in)ability and (un)willingness to prosecute grave abuses - both nationally and within the Rome Statute system. The norm's enforcement can be studied as a function of navigating the norm's degree of delegation to state actors, or the grant of "authority to implement, interpret, and apply the rules," and degree of obligation, or the extent to which "states or other actors are bound by a rule or commitment."[311] The section below explores how this influences the pursuit of justice in both national jurisdictions and at the ICC.

National Jurisdictions

On the national level, pursuing justice for grave crimes is subject to two types of obstacles linked to the institutional context, both of which can be influenced to different degrees by state actors: practical and political obstacles. While the distinction is not clear-cut, both types are exacerbated in conflict-affected situations where insecurity as well as political stakes are higher.[312] Practitioners and scholars have underlined the importance of taking the importance of institutions into account in both implementing and analysing transitional justice, as not doing so risks overstating the agency of human rights advocacy.[313] By extension, not doing so risks understating the influence of elite agency in light of the weak capacity and credibility of institutions.

First, various practical obstacles beyond the reach of state actors can significantly impede effective, impartial, and independent justice processes. Arising from the instability and depleted public resources generated by the conflict, these practical obstacles range from the inability of judicial actors to investigate abuses in areas outside of the government's control, the issuance of threats and intimidation by potential targets (including government and non-state actors), as well as a lack of sufficient financial and material resources for prosecution of international crimes.[314] Regarding the weakening of the judicial infrastructure due to the post-electoral crisis, the UN Independent Expert on Human Rights in Côte d'Ivoire noted that 17 of

[311] Abbott et al 2000, 401.
[312] Nouwen 2013a, 369.
[313] Duthie 2017, 13; Waldorf 2017; UN Docs. A/HRC/30/42 (2015).
[314] A short list of necessary resources includes training for judicial actors, expertise in forensic science, and victim and witness protection resources.

34 courthouses and 22 of 33 prisons had been damaged during the crisis.[315] Reflecting the judicial incapacity in Mali as a consequence of the armed groups' occupation, which included the systematic destruction of all state presence by jihadist groups seeking to replace the judicial order by sharia law, the Supreme Court of Mali decided in July 2012 and January 2013 to transfer the jurisdiction of the northern regions to the Court of First Instance of Commune III in Bamako.[316] As late as September 2017, only one third of public agents, including judicial and penitentiary personnel, had been redeployed to central and northern regions.[317] The widespread insecurity make it extremely challenging for judicial actors who want to act on criminal allegations to organise investigations and prosecutions, seen by the threats and even kidnappings of judicial actors.[318] While significant hurdles, these practical challenges are not the only impediments to effective, impartial, and independent investigations and prosecutions.

Second, beyond these practical obstacles, political obstacles refer to those that the government could theoretically remove or ease if it wished. Such political obstacles emerge due notably to weak judicial independence that enables undue influence on judicial actors. Some scholars take this factor into account by including, for instance, quantitative indicators of judicial independence.[319] However, elite manipulation of legal processes can be difficult to systematically analyse as it can be both explicit, through structural links between judicial bodies and executive power, as well as implicit, through unofficial instructions and signals given by political officials to members of the judiciary. Typical of conflict-affected contexts, executive influence over the judiciary "tends to be exercised through informal and material controls that" render formal legal safeguards of independence inoperative. Indeed, "idealistic accounts of a duty to prosecute might miss the fact that domestic courts use a range of what might be understood as avoidance techniques to deal with politically difficult questions."[320] According to human rights organisations, while Côte d'Ivoire formally guarantees the independence of the judiciary in its constitution, in practice, "judges that act independently are

[315] Human Rights Council 2012, paras 19-20, 29.
[316] Cour suprême de Mali, section judiciaire, chambre criminelle, arrêt no46 du 16 juillet 2012 portant dessaisissement de la région de Kidal et désignation de juridiction du tribunal de la Commune III de Bamako; Cour suprême du Mali, section judiciaire, chambre criminelle, arrêt no4 du 21 janvier 2013 portant dessaisissement des régions occupées et désignation de juridiction du tribunal de la Commune III de Bamako. The northern jurisdictions were later reactivated on 16 February 2015.
[317] United Nations Security Council 2017, para 9.
[318] RFI 2017b.
[319] Dancy and Wiebelhaus-Brahm 2018.
[320] Jackson 2017b, 620.

the exception rather than the rule."[321] Regarding Mali, "the classic notion of judicial independence is quite far from the reality in Mali."[322] While not assuming that the judiciary is under the control of executive powers, it is highly relevant to trace how weak judicial independence shapes how the norm is implemented.

Despite lowered confidence in the judicial sector, population surveys in both Côte d'Ivoire and Mali highlight popular support for criminal accountability for perpetrators of international crimes. In a 2014 survey of 1,000 respondents in Abidjan, Côte d'Ivoire, 55% of respondents said that accountability for the 2010 post-election violence was important. Similarly, 69% responded that obtaining justice for the violence was necessary. When asked what should be done with those responsible for the violence, the most frequent response was that perpetrators needed to face trial.[323] In a 2014 survey of 2400 individuals throughout Mali, a majority of respondents (64%) expressed preference for retributive justice over restorative justice (35%). Respondents called for such prosecutions in national courts (47%) over international courts (25%).[324] Similar findings were reached by a 2017 survey of over 2800 individuals, which found that, despite widespread dissatisfaction with the judiciary, the majority of respondents favoured criminal prosecution in formal court system for conflict-related crimes.[325]

International Criminal Court

Beyond the national level, states retain a relatively central role in the Rome Statute system. Indeed, the Court's institutional design is a product of political compromise between sovereignty-constraining and sovereignty-accommodating elements. It is a compromise between the need to ensure its effectiveness as an independent tribunal, endowed with the capability of investigating and prosecuting both state and non-state actors, and the demands of accommodating sovereignty sensitivities. This led to two key features that both impose

[321] HRW 2014, 4.
[322] Fomba 2014, 84-85; Human Rights Council 2014, paras 24 and 35.
[323] Pham and Vinck 2014, iii, 41.
[324] AfroBarometer 2014.
[325] Avocats Sans Frontières 2018, 8. Neither survey found Malians view the customary justice system as the preferred forum for human rights prosecutions.

obligations on states while ultimately enabling states to play a central role in enforcing the anti-impunity norm.

The first feature is the Rome Statute's complementarity regime. According to Article 17 (a) and (b), the Court shall determine that a case is inadmissible where the case is being, or has been, investigated or prosecuted by a State that has jurisdiction over it, "unless the State is unwilling or unable genuinely to carry out the investigation or prosecution" or unless the State's decision not to prosecute the person "resulted from the unwillingness or inability of the State genuinely to prosecute." Based on this principle of complementarity, the ICC is unlike the International Military Tribunal at Nuremberg, the International Military Tribunal for the Far East, the International Criminal Tribunal for the former Yugoslavia (ICTY), and the International Criminal Tribunal for Rwanda (ICTR) – all of which had primary jurisdiction and thus the right to try matters irrespective of whether national authorities wanted to do so first. As outlined in Article 19, to challenge the admissibility of an ICC case, the state or the accused must show that the same case, in terms of suspects and conduct, is being addressed at the national level. As outlined in Article 20(3), the Court cannot try a person who has been tried by another court with respect to the same conduct unless the proceedings in the other court "were for the purpose of shielding the person concerned from criminal responsibility" or "were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice."

The sovereignty-accommodating dimension of the Rome Statute's complementarity regime is clear in that it allows the state with domestic jurisdiction over the crime to investigate and prosecute the case domestically first before the ICC can adjudicate it, as the ICC is intended to "supplement – not supplant – domestic criminal law prosecutions."[326] In other words, the ICC is conceived as a subsidiary accountability forum that gives states primary jurisdiction and thus accommodates states' understandably extreme reluctance to give up one of the key elements of sovereign power: the state's monopoly of force, which is epitomized in the power of domestic courts to try and punish perpetrators of crimes.[327]

At the same time, the Rome Statute's complementarity regime has a sovereignty-constraining dimension. While the complementarity regime does not impose a general legal

[326] Simmons and Danner 2010, 230
[327] Seils 2016, 7

duty on states to prosecute the crimes that are under the ICC's jurisdiction, it nevertheless does mean that a state is expected to be willing and able to prosecute a given case, or face "an exceptional decision of the ICC to intrude on national jurisdiction."[328] Depending on the case, and for a variety of reasons, the state may or may not wish to avoid ICC intervention. In cases where the state with domestic jurisdiction over the crime wants to avoid ICC investigations into a given individual for certain conduct, the state must genuinely investigate or prosecute the same individual for the same conduct in order to render the case inadmissible. It could be highly challenging for states to successfully render cases inadmissible before the ICC since the state must show evidence of investigations into the same persons and substantially the same conduct as the ICC's case, and the ICC Prosecutor "can always choose different conduct or incidents."[329] Further, as stipulated in Article 17(1)(a), the ICC judges may determine that a case is admissible despite a domestic investigation or prosecution if the judges find that "the state is unwilling or unable genuinely to carry out the investigation or prosecution." The idea that a supranational court can pressure governments to investigate and prosecute certain conducts for certain conduct, and interpret whether investigations and prosecutions are "reliable or fraudulent," has what Hurd describes as "dramatic" implications for the model of sovereign statehood and adds a novel aspect of hierarchy to international politics: the ICC is legally authorized to supercede domestic courts.[330]

The second feature is the ICC's dependence on state cooperation. The most significant constraint on the ICC Office of the Prosecutor's ability to act outside the binds of states' political will is its dependence on state cooperation for the enforcement of its mandate. Since the Court was not endowed with a police force and only has limited resources for investigation and prosecution, the Rome Statute requires such cooperation from states. States Parties are required to arrest and surrender a person sought by the Court (Articles 59 and 89 – 92), as well as to cooperate more broadly with respecting requests for assistance regarding the provision of evidence and testimony and the facilitation of investigation and trial. This leads to the paradox of the dependent-independent ICC Prosecutor.[338] While the ICC Office of the Prosecutor is legally independent, it is also "factually, utterly dependent."[339] Referring to another international tribunal, Cassese notes, "To walk and work he needs artificial limbs. The artificial

[328] Akhavan 2010, 1248.
[329] Nouwen 2013a, 107.
[330] Hurd 2017a, 228-229.
[338] Rosenberg 2017, 472.
[339] Robinson 2015, 338.

limbs are the state authorities; without their help the Tribunal cannot operate."[340] This feature means that, as it crafts a prosecutorial strategy, the Prosecutor must consider the prospects of state cooperation, a "function of the government's evolving interests."[341]

The central role played by states is most evident when states fail to cooperate. Indeed, states show fluctuating levels of cooperation in light of the fact that "they are both lawful authorities whose cooperation is valuable, and also objects of analysis and investigation."[342] This means that states are likely to be most willing to cooperate "where prior regimes, 'rogue' or disfavoured elements of the government, scapegoats, or non-State actors are under investigation."[343] The Statute's silence on the consequences of non-cooperation findings was also a reflection of the compromise with sovereignty, as the drafters did not want to endanger the adoption of the Statute "by examining it too closely."[344] At most, the ICC Prosecutor can apply for a finding of non-cooperation against a given State Party, which judges can then refer to the Assembly of States Parties or to the Security Council in cases of UN Security Council referrals. Overall, while the Court was "meant to operate above politics," its actual enforcement structure means that "the political interests and actions of states" are both antagonists as well as "indispensable allies" of the ICC.[345] Analysing the anti-impunity norm's enforcement features illustrates Hurrell's observation that the "transformationist rhetoric about 'post-Westphalia' substantially overstates the degree to which we have in fact moved beyond a state- and sovereignty-based order."[346]

As illustrated above, the state maintains a relatively central, though not wholly unconstrained, role and retains decisive decision-making power over whether to prosecute nationally or shift the costs of accountability to The Hague. From this privileged position, state actors can navigate the flexibility within the anti-impunity norm and determine its (in)ability and (un)willingness to prosecute in both national and international courts, as well as exercise implicit or explicit influence over the judiciary in cases of weak judicial independence. Indeed, this section also reveals how, while complying with the legal requirements and political expectation to hold individuals accountable for crimes, states can deploy the two versions of

[340] Cassese 1995.
[341] Rosenberg 2017, 472.
[342] Robinson 2011, 368.
[343] Broomhall 2003, 162.
[344] Broomhall 2003, 156.
[345] Peskin 2010, 206.
[346] Hurrell 2007, 9.

the anti-impunity norm depending on what is deemed strategically advantageous: either conduct prosecutions domestically or enabling prosecutions at the ICC by claiming it is unable and/or unwilling to pursue the case in domestic courts and effectively cooperating with the ICC.

The Norm's Functions

Having established in the previous section the significance of elite strategy and the mechanisms of the norm's enforcement, this section demonstrates how the norm's functions make it a salient resource to deploy strategically within the context of political contestation in times of internal armed conflict and crises of legitimacy. As demonstrated below, its salience stems from the overlap between two functions of the norm and two criteria of government legitimacy. In light of this overlap, the norm can be strategically and selectively implemented to help legitimate government actors via the delegitimation of their opposition in a manner that furthers a particular goal.

Drawing from the literature surveyed in Chapter 2, pursuing justice within conflict is expected to shape the conflict narrative through the depoliticization effect of the norm's criminal lens and shape power relations through inducement and marginalization.[347] These expected effects are based on legalist assumptions, in which the application of law is a matter of definite rules and procedures that can supplant and constrain politics. However, these effects are not as straightforward when applied in practice in politically-charged contexts. Regarding the first function, using the anti-impunity norm can help shape one part of the particular narrative of the conflict. Actors can use the norm as a frame that enables the branding of certain actors as innocent and others as criminal, thereby influencing actors' claims to being legitimate political interlocutors and members of the international community. Regarding the second and third functions, rather than simply incentivizing and marginalizing actors with alleged criminal responsibility, the norm can be used to selectively co-opt and neutralise certain actors over others, thereby influencing the government's ability to exercise effective control over the

[347] Another expected causal effect is deterrence. However, deterrence is highly challenging to robustly 'prove' and causally link a decline in abuses to the threats of prosecution as opposed to other factors. See Nouwen 2012; Koskenniemi 2002, 7-8; Schabas 2007, 57.

country. Thus, actors can use the norm to discursively shape the exclusion or inclusion of certain actors, as well as materially weaken and empower certain actors.

Overall, these functions can directly shape two fundamental criteria of government legitimacy: the narrative-shaping function can influence actors' claims of membership within the international community and the power-shaping function can influence actors' ability to exercise effective control over territory. The section below first presents these two basic criteria of government legitimacy and then explores how the norm's functions can shape the political contestation by influencing these two criteria. As it shows how the norm's functions overlap with two basic criteria of government legitimacy, the framework offers a way to analyse the question: how does "humanity law become central to the struggle over the capture of legitimacy"?[348]

Government Legitimacy

The question of government legitimacy is particularly relevant to studying internal armed conflicts, contexts marked by contested government legitimacy, as the value of winning the legitimacy contest is extremely high in internal conflicts in which non-state armed groups with aspirations towards statehood challenge the government on key axes of legitimacy.[350] In both Côte d'Ivoire and Mali, national officials, with support from international conflict resolution actors including the UN, regional organisations, and key states, focused on bolstering, rather than problematizing, the legitimacy and "ontological priority"[351] of the governments that were facing armed opposition.

Government legitimacy is generally based on two broad facets: the source of power and the exercise of power.[352] Regarding the first facet, as D'Aspremont contends, the origin of a government's power is a key way that its legitimacy is evaluated.[353] Indeed, it is widely accepted by states that the will of the people constitutes "the ultimate source of government legitimacy."[354] As long as it is constitutional and reflective of the will of the people, the *quality*

[348] Teitel 2013, 121.
[350] Clapham 1998, 150.
[351] Charbonneau and Sears 2014, 200.
[352] D'Aspremont 2006.
[353] D'Aspremont 2006, 883.
[354] Roth 2000, 38.

of the government, ranging from democratic to authoritarian, has not traditionally been a highly relevant factor.[355] The point here is that the source of power – constitutional and 'by the people' – is one facet of government legitimacy. The second facet – the exercise of power – enables observers to evaluate how a government exerts its power.[356] The source of power and the exercise of power are intrinsically linked, as "the apparatus in effective control is respected because, and only insofar as, it is *presumed* (albeit sometimes irrebuttably) to be the expression of 'the will of the people.'"[357] However, they are distinct, insofar as the origin of power is more binary (constitutional or unconstitutional) than the exercise of power, which can be bolstered and shaped over time and which becomes especially important in periods of internal armed conflict.[358]

This thesis focuses on this second facet – the exercise of power – and examines how governments bolster this aspect of their legitimacy. Indeed, studying the legitimation of governments in periods of strife is particularly illuminating because it sheds light on strategic attempts to justify and challenge existing power relations.[359] The exercise of power is itself based on two key elements: international membership and domestic effectiveness. In situations of internal armed conflict, embattled governments take measures to bolster their legitimacy by reinforcing both elements, including by deploying the anti-impunity norm, as explained later. The first element is its reputation as law-abiding and promoter of values of the 'international community,' or its *international membership*. International membership is based on a reputation as belonging to an international community by declaring its support for, and adhering to, international standards of conduct and promoting fundamental principles, including respect for international law and human rights. In light of the evolving view that "recognition and protection of human rights form an essential component in evaluating the

[355] Some argue that a "right to democratic governance" exists, but that debate is outside the scope of this thesis. Franck 1992.
[356] D'Aspremont 2006, 882.
[357] Roth 2000, 2.
[358] The distinction between the 'source of power' and the 'exercise of power' vaguely mirrors the distinction between 'input' legitimacy, i.e. claims to legitimacy based on some link with the authentic preferences of the members of the constituency in question, and 'output' legitimacy, i.e. the effective promotion 'of the welfare of the constituency in question.' Scharpf 1999: 6-9. However, 'input' and 'output' legitimacy are concepts more suited to the study of decision-making processes within governments or other institutions. (Schmidt 2012.) The present study focuses on how governments achieve the basic criteria that enable a government to effectively promote the welfare of the constituency in question.
[359] Bexell 2014, 292.

legitimacy of governments in the modern international system," it has increasingly become an expectation for legitimate authorities.[360] Since the legitimacy of elites is particularly jeopardised in times of conflict, it is reasonable to expect elites will endorse international norms during such periods in order to reinforce its legitimacy as a member of the international community.[363] While it has increasingly been linked to the "conditionality" for being a legitimate government and member of the international community, it is of course not a strict conditionality, as many governments who fail to uphold such norms maintain their status as legitimate. Nevertheless, states seek to avoid being deemed a rogue or pariah state by at least claiming support for, and justifying their actions with regards to, international law and human rights. Equally, in this "age of accountability" and era of "sovereignty as responsibility," armed groups have increased their engagement with international law and human rights "precisely because of an expected gain in international legitimacy," and criticise the government on this axis.[366]

The second element is its *domestic effectiveness*, or its ability to effectively control and secure a territory. In principle, the "legitimate governmental authority is determined by effective control over a territory."[367] In other words, having effective control of the state is a very important factor in how international law has traditionally viewed a legitimate government.[368] This criterion is central though not entirely essential. Governments with little or no effective control over substantial parts the territory due to challenges presented by opposition groups, which themselves "meet the most basic criterion of statehood, which is physical control over territory and population," have nevertheless in various cases continued to be viewed as legitimate representatives of the state.[369] This does not mean the government swiftly becomes illegitimate, but rather becomes legitimacy-challenged.

This study thus examines how a government seeks to shape its legitimacy during armed conflict by bolstering its international membership claims and domestic effectiveness - aspects of its exercise of power. In doing so, it draws upon Suchman's definition of legitimacy as: "[t]he generalized perception or assumption that the actions of an entity are desirable, proper, or appropriate within some socially constructed system of norms, values, beliefs, and

[360] Neuman 2018, 51; Tasioulas 2013.
[363] Sikkink and Finnemore 1998, 903.
[366] Jo and Bryant 2013; Jo, 2015.
[367] Vidmar 2013, 53.
[368] Wippman 2015, 800.
[369] Clapham 1998, 150.; Roth 2000, 2.

definitions."[372] In this sense, these two generic criteria for government legitimacy echo basic expectations of a government's legitimacy in the socially constructed systems at both the international and national levels. This approach is simply one of various ways of studying government legitimacy. This study is distinct from, for instance, studying grounded legitimacy. Rather than identifying the unique criteria on which the legitimacy of formal governance meshes with local communities' beliefs in Côte d'Ivoire and Mali, examined through an ethnographic and sociological lens, this study offers explanatory traction across contexts by examining generic and basic criteria.

In sum, as part of the perpetual process of legitimation during the political struggle in situations of internal conflict, both state and opposition actors take measures to strategically boost their own legitimacy and weaken the legitimacy of their opposition. Such contexts of contestation illustrate how legitimacy is relational. Put simply, the legitimation of one party is achieved through the delegitimation of its opposition. Deploying the anti-impunity norm is a resource upon which actors draw in this continual process of actors' legitimation and the delegitimation of their opposition. The next section shows how the norm's functions parallel the two elements of the government's legitimacy and can shape them in various and indeterminate ways. As presented in the table below, the narrative-shaping function can influence actors' claims to being a member of the international community while the norm's power-shaping function can influence actors' ability to exercise effective control.

Table 2: Relationship between the Anti-Impunity Norm's Functions and Criteria of Government Legitimacy

Criteria of Government Legitimacy	The Anti-Impunity Norm's Functions	
International Membership	Narrative-Shaping Function	• Villainizing / Privileging Political Interlocutors
Domestic Effectiveness	Power-Shaping Function	• Coercive Leverage • Selective Neutralisation

[372] Suchman 1995, 574.

Villainizing / Privileging Political Interlocutors

The pursuit of justice for past atrocities through criminal proceedings is widely expected to have a transformative effect by shaping historical conflict narratives, mainly through the establishment of a detailed and authoritative record of past events. As captured in the UN Secretary-General's report entitled "The Rule of Law and Transitional Justice in Conflict and Post-conflict Societies," trials are expected to help societies "emerge from periods of conflict by establishing detailed and well-substantiated records of particular incidents and events."[373] This is of course a subject of lively debate, often grounded in different conceptions of the relationship between 'truth' and 'law.' Much literature explores the variety of ways actors in post-conflict contexts engage with the historical narratives of mass atrocities generated through the retrospective measures of domestic and international criminal trials.[374]

This study contributes to a related but distinct pool of literature that focuses on how the increased salience of the anti-impunity norm during conflict offers actors a resource to shape the dynamic conflict narratives *during* conflict. Indeed, by serving as a particular frame that "shape[s] what is viewed and how what is viewed is interpreted,"[375] the anti-impunity norm can be used to shape narratives while conflict is on-going, thereby influencing how the conflict is dynamically understood by both domestic and international audiences. As opposed to the studies that explore how actors use the historical narratives that are generated through the

[373] UN Doc. S/2004/616, UN Secretary-General. 2004. "The Rule of Law and Transitional Justice in Conflict and Post-conflict Societies." Paras. 38-39.
[374] Wilson 2011; Houge 2019, 288; Douglas 2016. In line with assumptions found in the aforementioned UN report, some argue that shedding light on what happened can deflate the ability of political entrepreneurs to incite violence based on ideologies that are built on historical revisionism, distortion, and erasure of past crimes. Yet, exploring how contested the "truth" generated from a criminal legal process can be, other studies highlight how political elites in post-conflict contexts ranging from post-Yugoslav states to Algeria use these particular historical narratives to entrench certain meanings and interpretations of the past for political aims, with the effect of overshadowing certain powerful parties' responsibility for abuses and often exacerbating societal divisions. For a selection of studies on how elites interpreted the proceedings at the ICTY to promote clashing narratives about guilt and victimhood in post-Yugoslav states, see Clark 2009; Subotić 2013; Bieber 2014; Klarin 2009. In a case study of Algeria, Mecellum shows how, following the discovery by the national investigative commission of state complicity in enforced disappearances and the mounting pressure to prosecute alleged state-aligned perpetrators, the current Algerian government strategically shifted the historical narrative to shape how the 1990s conflict is understood, moving from an interpretation of the violence as "injustice" to "misfortune caused by ambiguous forces." Mecellum 2018, 254.
[375] Srinivasan 2012, 2015.

litigation and judgment of trials, analysing how actors use the idea that perpetrators must be held responsible for abuses during conflict entails also studying measures that come before trial, including accusations and denials of responsibility for abuses, the issuing of arrest warrants and amnesties, and arrests. The framework presented below, and applied to the case studies, shows how interpreting political events through the frame of the anti-impunity norm enables actors to brand certain conflict parties as supporters, and others as violators, of international standards of conduct. Doing so helps actors to strategically influence a key criterion of legitimacy that is vitally at stake during conflict - the reputation of conflict parties as members of the international community and thus as legitimate political interlocutors. . Since, as Bell notes, questions of parties' status and legitimacy to negotiate become paramount during conflict, their reputations as legitimate or illegitimate political interlocutors are also a central aspect of the conflict narrative.[376] Using the anti-impunity norm can indeed reinforce a distinction between parties - between the innocent and the guilty, the political and the criminal, the friend and enemy of the international community, and thus the legitimate and the illegitimate.

Before explaining how the anti-impunity norm can be a particularly powerful interpretative resource in shaping narratives by influencing this legitimacy criterion, it is important to explain how the concepts of 'frames' and 'conflict narratives' are related yet, as used in this thesis, distinct. The conflict narrative can be understood as "how a story is told, which events are selected, how they are presented and connected to other events or myths, or placed in a historical or cultural context."[377] Drawing on Autesserre's approach, frames, on the other hand, consist of ideologies ("assumptions and definitions taken as given") and paradigms (the liberal peace). Frames can thus shape conflict narratives, as they "shape one's understanding of objectives or processes and how one acts toward or within them."[378] In this case, the frame of the anti-impunity norm highlights the imperative of holding perpetrators of abuses criminally accountable for serious abuses, what some scholars has described as having "become almost unquestionable common sense that criminal punishment is a legal, political, and pragmatic imperative for addressing human rights violations."[379] This frame can influence the conflict narrative because it shapes the understanding of the causes of the conflict, who

[376] Bell 2017, 89.
[377] Dijxhoorn 2017, 41.
[378] Autesserre 2009, 252-254.
[379] Engle, Miller, and Davis 2017, 1.

should be held responsible for the conflict, what should be done to manage the conflict, and who should be involved in doing so.

The anti-impunity norm, through the focus on individualization within international criminal law, focuses responsibility on individuals rather than on collectives. Judging a person, rather than a whole group or nation, is intended to avoid collective stigmatization and recrimination. It also focuses on judging actors through their conduct, rather than their grievances, according to legal standards that delimit non-criminal from criminal behaviour. This legalization thus helps frame certain conduct, and by extension the actors, through a binary between 'non-criminal' and political vs. 'criminal' and no longer political, as those criminalized are "considered to have put themselves outside the pale of politics, and even humanity, through their inhuman acts."[380] In doing so, it decontextualizes the conflict and narrows the understanding for how the conflict evolved, since the "meaning of historical events often exceeds the intentions or actions of particular individuals" and stems from structural causes.[381] In light of these interpretive features, applying this frame in such inextricably political contexts as armed conflicts can thus help actors shape a conflict narrative in ways that benefit certain actors by painting a particular narrative that highlights some aspects while obscuring others. To be clear, this is of course not argue that, in light of these effects, the anti-impunity norm should not be used. Perpetrators of crimes should obviously be denounced for such conduct. Rather, it is to problematize the binary between law and politics that is assumed by the view that the anti-impunity norm only depoliticizes conflict.

In terms of the criteria for legitimacy, applying the anti-impunity norm can thus shape the politics of reputation and influence the claims made by state and opposition actors to be political interlocutors that support international law and a members of the international community. Using the anti-impunity norm can shape the conflict's dynamics through its branding effect - villainizing certain actors as illegitimate and, by extension, privileging certain actors as legitimate. As Autesserre notes, frames can "reify and perpetuate arbitrary and often dichotomous categories such as man/woman, war/peace, or barbarian/civilized."[382] In this case, international criminal law has a particularly power branding effect as it "draw[s] bright lines between acceptable and unacceptable behaviour,"[383] and thus draws bright lines between who

[380] Branch 2011, 182.
[381] Koskenniemi 2002, 12.
[382] Autesserre 2009, 252-254.
[383] Simpson 2007, 158.

is acceptable and who is not. Its branding effect stems from its implicit reference to humanity and its implicit definition of the boundaries of the international community – making it "a spectacular form of global regulation."[384] As Kinsella explains, this regulation has productive effects, including the production of the subject.[385] In this sense, international criminal law defines and highlights those acts that put the agent outside the community. Offenses are perpetrated "not only against the victim but also – and primarily – against the community whose law is violated" and the perpetrator has harmed "international order, and mankind in its entirety." [386] Appealing to humanity and thus highlighting a particular vision of the "international community" can, somewhat paradoxically, reinforce the exclusion of particular actors.

The act of identifying the opposition as 'criminal' simultaneously produces the subject of the identifier, as it makes the identifiers come into existence as non-criminal and legitimate. The one denouncing such harm is portrayed, at least to a certain degree, as a defender of this community. Even before any arrest warrant, trial, judgment, or sentence, a group mentioned as allegedly responsible for abuses, and especially by the ICC, is to some extent criminalised and branded as enemies of mankind, "whereas those who can side with the enforcement of international criminal law can rebrand themselves as friends of humanity." [387] This can reinforce an actor's "attempt to undermine the legitimacy of their adversary's purpose and aims while elevating the legitimacy of their own."[388]

Since the norm's framing effect allows actors to signal the villains, the virtuous, and the victims, the norm can be used by states and other actors as they promote an "intentional" causal story, or a particular understanding of the conflict that shapes certain actors as the cause of the conflict. According to Walling, "intentional stories identify and name perpetrators who are responsible for deliberate harm to their victims. These are stories about aggression, ethnic cleansing, genocide, or systematic human rights and international humanitarian law violations, which are frequently classified as crimes against humanity or war crimes."[389] Yet, while the norm can be used to shape the dynamic contemporary narrative, it can narrow the story by also

[384] Teitel 2011, 201.
[385] Kinsella 2010, 164.
[386] Arendt 1963, 261 and 268-269 quoting Telford Taylor's 1961 article in the *New York Times* entitled "Large Questions in Eichmann Case," as cited in Luban 2004, 88.
[387] Nouwen and Werner 2015, 161.
[388] Kersten 2016, 41.
[389] Walling 2013, 246.

strategically overshadowing both past abuses committed by the identifier and the group they represent as well as, more broadly, that party's responsibility in the broader structural causes for the conflict. In other words, by tracing how the discourse of international criminality is used, it becomes clear how it can help overshadow other parts of a more holistic understanding of the conflict.

If discourses can exclude, they can also include. While the anti-impunity norm is generally viewed through its exclusionary effects vis-à-vis those targeted, the branding effect can also be used to 'repoliticise' actors. Through selective branding, the anti-impunity norm can be used to rhetorically "adjudicate[e] over the merit and demerit of various groups in international society."[390] Yet, the definition of the 'enemy' is not fixed but rather fluid and can evolve over time in line with evolving dynamics of the conflict. This process of 're-politicization' entails no longer viewing the actor in light of their conduct and potential responsibility for abuses, but rather treated as an actor with grievances. More concretely, anti-impunity measures against certain parties can be suspended in order to politically rehabilitate their status as legitimate interlocutors and place belligerent parties on a more equal moral standing by avoiding any villainization.[391] In practice, in cases where the opposition is not unified, strands of the opposition may wish to present themselves as potential partners rather than enemies of the peace and seek to distinguish themselves from other members of the opposition. This is particularly relevant as conflicts can be ignited when parties feel excluded or resolved when their political demands were recognised, instead of being treated as demands by purely criminal actors.[392]

To be clear, this does not mean that the anti-impunity norm is used to shape how the conflict is understood *internationally* rather than nationally. Rather, as one aspect of the conflict narrative, the portrayal of government or opposition actors as legitimate members of the international community is relevant for influencing the perceptions of both national and international audiences. Expressing support for the anti-impunity norm can help actors boost their reputation by signalling their membership to 'the global village,' which can improve their image not only in the eyes of the 'international community' but also among domestic audiences as a supportive partner in the cosmopolitan collective 'struggle against impunity,' while

[390] Mégret 2015a, 79.
[391] Snyder and Vinjamuri 2003/2004, 7.
[392] Nouwen 2013, 331.

gaining benefits by delegitimating one's opposition in so doing.[393] For governments, showing domestic audiences that the government is deemed acceptable to international actors can indeed be part of the government's efforts to boost the its authority in its national constituency, as it can send a message of the government's viability in conducting international relations. This is especially beneficial in states "where sovereignty and its representation in practice heavily dependent on external recognition."[394] Similarly, opposition parties that seek to challenge the government's legitimacy also seek to shape their reputation as legitimate and law-abiding political interlocutors both in the eyes of the international community but also among domestic audiences, in order to defend their aspirations of being a viable governing entity. As Jo explains, legitimacy-seeking rebels are more likely to comply with international law "with the expectation of political benefits of domestic or international legitimacy that can aid their military struggle," as they seek recognition, legitimacy, and reputation.[395]

In sum, using the anti-impunity norm serves as a frame is often expected to de-escalate conflict based on the premise that it helps view the conflict through a depoliticized approach, in part through its focus on individuals, their conduct, and legal rules of (il)legal conduct. In other words, if a political approach to the etiology of conflict focuses on the contestable meaning of individuals' adversarial actions operating within a collective context shaped by larger (economic, political, legal, cultural, organisational…) structures, then a depoliticized approach focuses on analysing the actions of specific individuals in comparison to widely-known rules of (il)legal conduct that, if violated, require certain consequences. Yet, and importantly, depoliticization can have political effects on the conflict landscape. In other words, in a Schmittian view, the essence of politics is the differentiation between friends and enemies. This differentiation can be constructed through the norm's purported aim of depoliticizing conflict by focusing on individual actors' conduct according to legal standards rather than collective grievances and a systemic analysis. In a spin-off of Schmitt's views, and building off of Nouwen and Werner's analysis, by interpreting individual actors' through a criminal lens and a narrow contextual analysis, the anti-impunity norm enables actors to brand the enemy 'other' as criminal and no longer 'political,' thereby contributing to this differentiation that represents, for Schmitt, the essence of politics. [396] Tracing how the norm's

[393] De Vos 2015, 405; Nouwen 2013a, 194.
[394] Nouwen, 2013, 365.
[395] Jo 2015, 64-65.
[396] Nouwen and Werner 2010, 941 and 962. Nouwen and Werner note, in both Uganda and Sudan, "warring parties instrumentalised the ICC's intervention to brand opponents as *hostis*

discursive function is used by actors reveals how control over the framing can "translat[e] into the power to define threats to international peace and security, to assign responsibility for conflicts and to shape interpretation of relevant norms, including human rights."[397] This power to define is directly related to how using the norm can also influence the more material power of relevant actors.

Coercive Leverage and Selective Neutralisation

Whereas the norm's narrative-shaping function can help brand actors's international membership claims and reputations as legitimate political interlocutors, the norm's power-shaping function can be used empower and disempower certain actors, thereby influencing the ability of the government and its opposition to exercise effective control. "With inclusion and exclusion, come empowerment and disempowerment."[398] More specifically, pursuing justice is expected to contribute to resolving conflict by having two effects on actors' power: *inducement* and *marginalization*. However, as explained below, the way in which actors used conflict-related justice measures in practice is better understood from a political bargaining perspective that highlights how actors strategically implement these measures to shape the balance of power in conflicts.

First, anti-impunity measures are expected to increase the likelihood that conflict can be settled through *inducement*, as anti-impunity measures in theory "complement that basket of liberal norms that seeks to reconcile warring parties and promote peace through negotiated settlements and power-sharing arrangements."[399] More specifically, "retributive criminal justice may induce an increased desire on the part of a potential target to partake in a peace process."[400] Threats of prosecutions and arrest warrants are expected to shift the cost-benefit analysis of belligerent parties and can exert pressure upon warring sides, convincing combatants that further combat is not likely to be successful. However, a richer way to understand how the parameters of justice can induce actors is by analysing it as a means of

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humani generis, or enemies of mankind, and to present themselves as friends of the ICC, and thus friends of the international community…Its cooperation with the ICC led to an impression of friendship with the Court, which boosted its international legitimacy."

[397] Walling 2013, 245.

[398] Corrias and Gordon 2015, 112.

[399] Vinjamuri 2010, 196.

[400] Kersten 2016, 23; Vinjamuri 2010, 195.

coercive leverage. In other words, rather than simply inducing the opposition to join negotiations, the norm can arguably serve as a means of coercive leverage, or a bargaining chip, with individuals deemed necessary for peace. This leverage can be used by governments and negotiators as incentive for potentially targeted parties to participate in peace talks or cede power.

Most obviously, the threat of trial can be used to pressure parties to lay down their arms and cede power, incentivising certain groups or commanders to defect by removing the prospect that even a military victory would result in nothing but continued condemnation or even a trial. Equally, the threat of trial, amplified by a self-referral and/or the opening of ICC investigations, can incentivise parties to join the negotiating table, as it can encourage leaders to join talks as a way of regaining status by becoming official interlocutors in a peace process.[401] Indeed, fears of prosecution both nationally and by the ICC may convince parties that "diplomacy may produce better outcomes than what they can expect to experience on the battlefield" and may even encourage them to offer concessions at the bargaining table. Also, leaders may see engaging in a peace process "as a means of short-circuiting ICC action" and "may even seek to encourage the belief among outside powers that, while they are interested in pursuing peace talks, further ICC action risks replacing the existing leadership of the warring side with hardliners more opposed to mediation."[402] In another sense, Simmons and Danner argue that states invite ICC intervention to signal to its opposition its commitment to non-violent means and to political negotiations.[403]

Also, offers of amnesty can be used strategically to incentivise parties to join negotiations or to cede power to step down without fear of criminal accountability.[404] De facto or formal amnesties can be offered to marginalize strong spoilers and facilitate the adoption of peace negotiations. Other measures include the request for the Security Council to temporarily

[401] Kersten 2016, 46.
[402] Greig and Meernik 2014, 268-269.
[403] Simmons and Danner 2010.
[404] For instance, Orentlicher noted a controversial Security Council resolution on Yemen adopted in 2011, which "endorsed an initiative that promised a blanket amnesty for the country's then leader in exchange for his stepping down – even while condemning human rights violations attributed to his government and stressing 'that all those responsible for violence, human rights violations and abuses should be held accountable.'" SC Res. 2014 (2011), operative § 2. Orentlicher, 2013, 520. Also, in Algeria, "the regime's use of amnesty to disarm individual militants rather than to bargain with their leaders indicates that the government's goal was not a negotiated peace, but rather a military victory." Fraihat and Hess, 2017, 66.

suspend ICC investigations for a renewable one-year period, which could be used by mediators as a potential incentive in efforts to bring parties to the negotiating table or to pressure parties to cede power. Overall, this form of clemency, by formally suspending accountability for grave crimes or by deliberately not implementing such measures, serves as a type of "safety valve" which may in fact "operate as disconcertingly as political justice itself."[406]

However, the success of these measures of coercive leverage is of course entirely uncertain. If the opposition fears being held accountable, through national or international justice, they may bolster their resolve to continue fighting, fearing arrest once they lay down their weapons. Also, fears of possible prosecution can incentivise parties to dig in their heels and avoid direct contact with their opponents or external actors who may see to enforce judicial measures. Further, the normative shift away from impunity means that the flexibility of mediators has been reduced as offers of amnesty and the lifting of arrest warrants are increasingly subject to scrutiny, closing off the possibility to offer potential spoilers a deal that will leave them weak and secure.[407] Mediators may feel pressure not to offer incentives such as amnesty and exile. Even if they do, parties may also reject offers of exile and "honourable exits" from the country since doing so would imply their guilt or the wrongfulness of their actions and would damage their political status and struggle. Even after joining negotiations, leaders can walk out or refuse to sign deals, possibly rallying their forces against the prospect of peace. This is further complicated by the ICC's independence since, "[I]f the Rome Statute's 'no impunity' directive cannot be compromised in an ongoing war and is seen as binding on governments and mediators, it makes negotiated settlements highly improbable and biases conflict resolution toward military solutions."[408]

Second, anti-impunity measures are expected to increase the likelihood that conflict is settled through *marginalization* of alleged criminals, as a "primary mechanism through which justice can help deliver peace" is by excluding belligerent parties.[409] Accordingly, targeting leaders is expected to "trigger a loss of power" and thereby weaken their base of support.[410] For instance, according to the ICC Prosecutor, "Arresting and removing Harun today will contribute to breaking the criminal system established in Darfur [and] will help peace, the

[406] Kirchheimer 1961, 20.
[407] Snyder and Vinjamuri 2003/2004, 13.
[408] Rodman 2014, 462.
[409] Vinjamuri 2013, 3.
[410] Vinjamuri 2010, 195.

political process and the deployment of peacekeepers."[411] However, a more enlightening way to understand how marginalization can influence outcomes is by analysing its use as *selective neutralisation*. In other words, taking into account the impact of prosecutorial discretion and the inherent selectivity of the enforcement of international criminal law, governments can use judicial measures to selectively neutralise certain parties and perceived spoilers to shape a balance of power in ways that favour the government's intended outcome. The target's willingness and ability to continue fighting may be hampered due to a loss of support and/or due to their incarceration.[413] As Wegner explains, "a leader sought by arrest warrant will find it more difficult to mobilise his followers since the potential gains of an armed struggle are nullified through his international 'pariah' status."[414] Neutralisation can isolate "those leaders and parties who believe that peace emerging from negotiations threatens their power, worldview, and interests, and use violence to undermine attempts to achieve it." [415] Additionally, judicial measures can selectively marginalise spoilers *within* a party who "might have their own reasons for prolonging or renewing the conflict,"[416] thereby making way for more moderate leadership. In sum, arrest warrants and criminal trials can "identify, stigmatize, and even physically remove certain individuals from a region of conflict. Indictment and arrest of potential 'spoilers' can ensure that they do not partake in the peace processes or continue unduly to influence a fragile transitional society."[417]

Drawing upon the anti-impunity norm for selective neutralisation can also extend to shaping - to a limited extent - international justice. While the ICC is formally independent, governments can take certain actions in anticipation of 'burden-sharing' with the ICC and to encourage ICC investigations against particular targets. Most clearly, by issuing self-referrals, governments can shift the political costs of prosecution towards The Hague. Also, governments can interpret complementarity based on a cost-benefit analysis of whether transferring individuals or trying them domestically and thereby challenging the admissibility of the ICC's case, is most advantageous. Equally, though this would violate their obligations under the

[411] Moreno Ocampo 2008a, 8. The Prosecutor also invoked this argument regarding the investigation of Joseph Kony and four other Lord's Resistance Army (LRA) commanders. "There is no tension between peace and Justice in Uganda: arrest the sought criminals today, and you will have Peace and Justice tomorrow." Moreno-Ocampo 2007b, 3.
[413] Dancy and Wiebelhaus-Brahm 2018, 48.
[414] Wegner 2015, 36-37.
[415] Stedman 1997, 5.
[416] Lie, Binningsbø, and Gates 2007, 5.
[417] Kerr and Mobekk 2007, 7.

Rome Statute, governments can selectively enforce international arrest warrants, as a means of incentivising their opposition to join the negotiations.

Also, actors can invoke the need to respond to and prevent further human rights abuses to justify its use of force and to bolster calls for international intervention, which would help neutralise the opposition. Since invoking international criminal law internationalizes the scale and gravity of the conflict, it can help portray the conflict as a threat to regional and international stability and thus a matter for international engagement and partnership. As Nouwen and Werner explain, by framing the political conflict through the lens of international criminal law, "some issues are elevated to a level beyond the local, the national, and even the international, thus paving the way for outside interventions in the name of a more encompassing global community."[418] Measures by international tribunals can bolster this strategy. By implicitly labelling a "good" side and marginalizing an "evil" side, the ICC has been accused of "legitimis[ing] the humanitarian claims of intervening forces"[419] and providing "moral clarity for policy makers seeking to negotiate the surrender of the aggressor."[420]

However, these expected effects are of course risky. Most clearly, the issuance of arrest warrants either nationally or by the ICC, can dissuade both targeted and non-targeted leaders from ending hostilities and push them to continue the conflict. Targeted leaders may see redoubling their efforts on the battlefields "as a means of deterring a continuing ICC investigation and improving their bargaining position in the conflict"[421] and "as a way to avoid capture, extradition, and trial."[422] Also, the marginalisation effect assumes that the targeted party is replaced by a more moderate leader, one that is more amenable to resolving the conflict by peaceful means, which is entirely uncertain.[423] Further, it can also complicate or even block diplomatic efforts at engaging with the targeted party and limit the means available to mediators. The ICC has called on states to "eliminate non-essential contacts with individuals subject to an arrest warrant issued by the Court" and to "contribute to the marginalizing of fugitives."[424] Moreover, the measures taken by the independent ICC Prosecutor may thwart and

[418] Nouwen and Werner 2015, 162.
[419] Roach 2005, 440-443.
[420] Triponel and Williams 2013, 818.
[421] Greig and Meernik 2014, 269.
[422] Prorok 2017, 215.
[423] Vinjamuri 2010, 195.
[424] Office of the Prosecutor 2010, 12-14.

derail other actors' strategy, by targeting government officials or government-affiliated armed groups or individuals who are crucial to peace talks.

Overall, while the idea of criminal accountability is often viewed as shaping the conflict landscape through *inducement* and *marginalisation* of parties, the effects of both national and ICC anti-impunity measures are not determinative and are rather highly contingent. From a political bargaining perspective, a sharper way to analyse how actors' deployment of the anti-impunity norm shapes political dynamics within conflict is by considering how it is used as a source of *coercive leverage* and *selective neutralisation*, to exclude and include certain actors into political arrangements, as both can theoretically favour the government's ability to exercise effective domestic control over the territory. This view takes into account the agency held by government actors in enforcing judicial measures as well as the need, in both negotiated settlements and one-sided victories, to include and exclude actors who are allegedly criminally responsible for grave abuses.

More broadly, it is important to note that the nature of these crimes - as atrocity crimes - plays a role in the use of the anti-impunity norm as a resource. As atrocity crimes have been identified as affronts to humanity as a whole, in light of their gravity and scale, the application of considerations of international criminal law raises the stakes in various ways. Their nature of atrocity crimes increases the imperative to pursue justice for victims of the crimes and the scrutiny on governments with regards to how they address accountability of perpetrators. In doing so, it amplifies the branding effect against alleged perpetrators, as these crimes are deemed grave affronts against universal values and codes of conduct. In parallel, it raises the ability to use threats of prosecution as coercive leverage. Relatedly, it increases the desire of alleged perpetrators to benefit from amnesty and thus increases the leverage of offers of impunity for such crimes to incentivise actors to change their conduct. Put differently, the use of law as apolitical resource would not be the same, but rather weaker, if used to address crimes that were of lesser gravity. While it is beyond the scope of this thesis, it would be interesting to consider how pursuing criminal accountability for other crimes that are not deemed atrocity crimes, such as terrorism or environmental degradation, would be used as a resource to shape the political landscape during conflict.

Conclusion

Much scholarly literature argues that the anti-impunity norm offers "language and processes by which to deal with conflict"[425] and the pursuit of justice for grave abuses helps legitimate governments, but the literature lacks a framework through which to analyse these claims more clearly and systematically. There is indeed a need, as flagged by Bell, to recognise "the distinctness of conflicts, their particular conflict resolution imperatives, and the ways in which transitional justice language and mechanisms are strategically deployed by parties."[426]

Focusing on one part of transitional justice, that of individual criminal accountability, this thesis offers a way to do so. First, it improves on existing frameworks by taking seriously how elite political strategy influences the norm's implementation. Second, it considers how the norm's institutional enforcement framework shapes actors' ability to support or undermine anti-impunity measures. Third, it illustrates how the anti-impunity norm's functions overlap with basic criteria of government legitimacy, meaning implementing the norm can further the government's strategy of bolstering its legitimation through the delegitimation of its opposition.

Examining norm exploitation thus reveals how norms are used as a strategic resource to shape the political landscape of a country affected by internal conflict in their interests, a resource that stems from the structure of the norm's enforcement, its functions, and elite objectives. Norm exploitation is different from related concepts proposed by other scholars. It is different because it does not necessarily imply, as "norm hijacking" does, that actors take measures that appear to support justice but in fact undermine or ignore the norm's substance and thus the norm's strengthening does not actually "produce justice."[430] This remains a possibility, but not an inherent part of the concept. In other words, exploiting the norm does not have a negative normative connotation, as it were. It depends, rather, on how it is exploited and to what aims. Over the next four chapters, the politics of accountability and impunity in Côte d'Ivoire and Mali are analysed through this framework.

[425] Teitel 2011, 215.
[426] Bell 2017, 108.
[430] Subotić 2009, 171.

Chapter 4: The Electoral Imbroglio in Côte d'Ivoire (2010-2011)

Introduction

The 2010 presidential election in Côte d'Ivoire was expected to close the chapter on what had been nearly a decade of precarious "neither war nor peace" instability.[431] The remarkably high turnout rate of 82% reflected such hopes. Instead, the dispute over the election results between incumbent President Laurent Gbagbo and long-time rival Alassane Ouattara sparked a crisis that would last five months and kill over 3,000 people. Knowing Laurent Gbagbo, Simone Gbagbo, and political youth movement leader Charles Blé Goudé were later charged with crimes against humanity by the International Criminal Court, and that Alassane Ouattara went from being beleaguered in a hotel room to "truly the president of Côte d'Ivoire,"[432] it is crucial to analyse how actors' usage, or deployment, of the anti-impunity norm shaped the political dynamics during the crisis.

This chapter first provides background regarding the post-electoral crisis and presents the chapter's central argument. It then analyses how actors used the anti-impunity norm's functions in furthering short-term objectives and traces how the state's relative centrality within the enforcement of justice shaped how the norm was implemented. The chapter focuses on the measures taken by the Ouattara administration, but also highlights measures taken by the UN, France, ECOWAS, and the AU, as these actors were deeply involved in the negotiations. By tracing the norm's exploitation, this chapter shows how the anti-impunity norm was not a rule that supplanted and constrained politics but rather a flexible resource that contributed to shaping the political dynamics of the conflict on terms favoured by the Ouattara government, supported by key international actors. This chapter then leads to Chapter 5, which explores how the anti-impunity norm was used by actors in the years following the post-electoral crisis in the context of stabilisation efforts in Côte d'Ivoire.

[431] McGovern 2011a, x.

[432] Simon 2016, 330.

Background

Following the second round of the presidential election, held on 29 November 2010, Côte d'Ivoire found itself in an extraordinary electoral-political deadlock marked by a severe crisis of governmental legitimacy. The Independent Electoral Commission (IEC) declared Ouattara the victor, having received 54.1% versus 45.9 % of the vote. Endorsing the results announced by the IEC and certified by the United Nations Special Representative of the Secretary-General (SRSG) Young Jin Choi, the vast majority of states as well as the Economic Community of West African States (ECOWAS), the African Union (AU), and the UN Security Council recognised Ouattara as the president-elect. However, on 3 December 2010, the Constitutional Council of Côte d'Ivoire invalidated results in seven regions, which represented approximately 10% of the vote, and declared Gbagbo the winner with 51.45% versus 48.55% of the vote.[433] Ivorians suddenly found themselves with two presidents, two governments, and "two legitimacies."[434]

Exacerbating the chaotic political situation, multiple official and unofficial armed forces operated in Côte d'Ivoire. On the pro-Gbagbo side were the state security forces, (including the Defense and Security Forces, police, and *gendarmerie*), armed militia groups (including the youth group known as the *Jeunes Patriotes*), and mercenaries. Fighting on the pro-Ouattara side was, primarily, the armed branch of the *Forces Nouvelles* rebels known as the Armed Forces of the *Forces Nouvelles* (*Forces Armées des Forces Nouvelles,* FAFN).. Pro-Ouattara forces also included the Invisible Commando armed group, self-defence fighters known as 'dozos,' and mercenaries. International forces on the ground included the United Nations Operation in Côte d'Ivoire (UNOCI) and the French Operation Licorne.

Both pro-Gbagbo and pro-Ouattara forces were allegedly responsible for serious abuses, with abuses most often committed on the basis of actual or perceived political and ethnic affiliation. The official death toll is often referred to as 3,000. This figure is a low estimate in light of the challenges of reporting abuses during the crisis.[435] In terms of the proportion of responsibility for abuses between pro-Gbagbo and pro-Ouattara sides, the National Commission of Inquiry appointed by Ouattara found pro-Gbagbo forces were

[433] BBC 2010.
[434] Hofnung 2011, 159.
[435] Interview with former member of UNOCI - Human Rights Division, London, 22 June 2015. See also Simon 2016, 324.

responsible for 1,452 deaths and the FRCI were responsible for 727 deaths.[436] From the beginning of the crisis in November 2010, most of the urban violence in Abidjan was committed by pro-Gbagbo forces, often intended to repress political opposition. Emblematic episodes of abuses allegedly committed by pro-Gbagbo forces, which later became grounds for charges of crimes against humanity, include the killing of over 150 civilians over six days in mid-December 2010, the attacks on women's marches in early March 2011, and the bombing of a market on 17 March 2011. Abuses by pro-Ouattara forces were increasingly reported starting in early March 2011 as they gained a foothold in Abidjan. For instance, pro-Ouattara forces were accused of abuses in Anonkoua-Kouté village in Abidjan, where mostly pro-Gbagbo communities lived.

While most of the focus was on the criminal conduct of pro-Gbagbo forces in Abidjan, pro-Ouattara forces were accused by UNOCI, the UN Human Rights Council's International Commission of Inquiry, and human rights organisations of perpetrating grave abuses, often targeting people based on ethnicity, particularly over the course of several weeks as they advanced southwards towards Abidjan in March 2011.[437] Specifically, the incident in the western town of Duékoué was "particularly shocking in its size and brutality," according to the head of the ICRC delegation, with several hundred people killed over two days between 29 and 30 March 2011.[438] More broadly, in western Côte d'Ivoire, both sides committed retaliatory "tit-for-tat" violence, often a continuation of long-standing tension surrounding control over land between indigenous communities, which tend to favour Gbagbo, and non-indigenous, or 'allogène,' communities from northern and central Côte d'Ivoire and West African states, which tend to favour Ouattara.

The post-electoral crisis, or what one scholar describes as a "slow-motion train wreck,"[439] was particularly complicated as neither side fulfilled all criteria of government legitimacy. The struggle was described as being "between an elected president without legitimate force and an illegitimate president that stayed in power because of the military forces under his command."[440] However, the crisis was even more than a clash between Ouattara as *de jure* vs. Gbagbo as *de facto* president. The deadlock stemmed from discord within

[436] Commission Nationale d'Enquête 2012.
[437] HRW 2011; HRW 2011; UNOCI Human Rights Division 2011; Human Rights Council 2011b.
[438] BBC 2011. See also Leclerc 2011**;** Corey-Boulet 2011.
[439] McGovern 2011a, 215.
[440] Charbonneau 2012, 519.

fundamental axes of governmental legitimacy. One basic axis of governmental legitimacy is formal international recognition, which stems from the origin of a government and whether the control of the means of governance was acquired through the established legal constitutional process.[441] In Côte d'Ivoire, the situation was complicated as there was a clash between two aspects of the government's "legitimacy of origin:" between strictly electoral and constitutional legitimacy.

On the one hand, Ouattara had international recognition, which was based on his electoral legitimacy, or "the claim that one has won the majority of the people's votes through an electoral process deemed free and fair by the international community."[442] Ouattara's legality was grounded in the UN SRSG's unprecedented mandate of certifying the presidential elections, as agreed in the UN Security Council Resolution 1765 (2007), which came in response to a request made by signatories of the 2005 Pretoria Accord. Thus, states swiftly and nearly unanimously recognised Ouattara as the president-elect, enabling him to participate in international relations in spite of his actual inability to control the territory through the constitutional means of governance.

On the other hand, Gbagbo had constitutional legitimacy, at least on a formal and procedural basis, as the Constitutional Council fulfilled its mandate to validate and announce the results more broadly[443] and "had not been constitutionally challenged in due process in domestic legal parlance."[444] His legality was thus grounded in the internal legal framework of Côte d'Ivoire.[445] Unlike Ouattara, who did not hold constitutional legitimacy as he had not officially been sworn in according to constitutional protocol, Gbagbo consistently referred to his constitutional legitimacy throughout the crisis, stating, "political crises in Africa are caused by people who do not respect the law…No country can be strong without respecting laws and

[441] D'Aspremont 2011.
[442] D'Aspremont 2011.
[443] Côte d'Ivoire Electoral Code; Articles 35, 37, 38 of Constitution of Côte d'Ivoire 2000.
[444] Rim 2012, 692.
[445] The Constitutional Council's decision to void the IEC's results was taken on the dubious legal grounds that the IEC missed the legal deadline of three days to announce the results. While the IEC indeed formally announced its results shortly after the deadline, it had been hindered from doing so earlier due to disagreement within the Council, including one Gbagbo-nominated member of the IEC tearing up the provisional results on live television before the spokesperson could announce them publicly. Further exacerbating doubts as to the Constitutional Council's credibility and its perceived pro-Gbagbo bias, the Council only voided results from predominantly pro-Ouattara areas. Defending this decision, some note that the armed group's control of the northern region made manipulation likely.

procedures."[446] The decision to not recognise Gbagbo based on the Constitutional Council's results was nevertheless unusual, as the UN General Assembly usually refers to the criterion of constitutionality in previous controversies around accreditations of government representatives.[447]

Crucially, Gbagbo's constitutional legitimacy enabled him to have the advantage on the second basic axis of government legitimacy, the exercise of power.[448] Gbagbo's legal authority in terms of national law enabled him to maintain administrative power, giving him control over political, military, and financial resources. Most importantly, Gbagbo could still rely on the security forces, particularly the Republican Guard, an elite unit of the gendarmerie known as the Center for the Command of Security Operations (Centre de commandement des operations de securité, CECOS), the navy, and mercenaries.[449] In contrast, Ouattara had no control over the army, limited finances to pay and retain the loyalty of his supporters, and limited ability to communicate with Ivorians.[450] His administration of just over a dozen ministers relied on phones and Internet to rule from the Golf Hotel, which was blockaded by pro-Gbagbo forces. The FAFN, estimated at around 10,000 elements, was armed mostly with light infantry weapons, including AK-47, machine guns, and rocket-propelled grenades, as well as limited number of heavy machine guns and armoured vehicles.[451] French authorities were reportedly shocked to realise that the FAFN, armed with "insignificant and obsolete" weapons, were in fact "not operational."[452] In the words of SRSG Choi, Ouattara led the "world's smallest republic" from a blockaded hotel while Gbagbo remained the "Master of Abidjan."[453] The balance of power was also, and crucially, perceived to be in Gbagbo's favour. Ouattara-appointed Prime Minister Guillaume Soro stated, "These generals and heavy weaponry have the respect of the immense majority of the army. Clearly, we can hold off this army for two days, three days, three weeks, but not indefinitely."[454] Also of crucial importance was

[446] VOA 2010.
[447] D'Aspremont refers to the accreditation of the delegates of Kuwait (1990), Afghanistan (996-2001), Haiti (1992), and Sierra Leone (1997).
[448] d'Aspremont 2006, 884.
[449] Choi 2015, 233. See also Hofnung 2011, 168.
[450] Notin 2013, 260.
[451] According to International Crisis Group, by March 2011, the FAFN were composed of about 10,000 elements. According to a report by the pro-Gbagbo alliance La Majorite presidentielle (LMP), the FAFN had 50,000 elements. ICG 2011.
[452] Simon 2016, 314.
[453] Choi 2015.
[454] Vaulerin 2010.

Gbagbo's control over the media, namely the Radiodiffusion Télévision Ivoirienne, which was a redoubtable "tool for legitimation" during times of crisis, in the words of a former Minister for Information.[455] As French Ambassador Simon realised shortly after the election, Gbagbo was "buoyed and maintained in power by the street" and "would only leave if constrained and forced out."[456]

Summarizing the ambiguity of this duality of government, Rim notes:

> the situation presented the extraordinary precedent of a state's having two competing entities claiming governmental authority, with one only partially de facto in his actual control of the administration but nationally de jure based on the constitutionality granted by the Constitutional Council, while the other was internationally de facto through the acceptance of his representation in the international community without having internal effectiveness, while remaining only potentially de jure via the theoretical democratic entitlement endowed by election victory.[457]

Over the next few months, a phalanx of international diplomats mobilised to resolve this unprecedented political deadlock. At the beginning of the crisis, key actors were broadly in agreement on the main objective: enabling Ouattara to reach the presidency by convincing Gbagbo to step down and excluding Gbagbo from future political arrangement. ECOWAS and the AU recognised Ouattara as President-elect and suspended Côte d'Ivoire on 7 and 9 December 2010, respectively.[458] On 20 December 2010, the UN Security Council passed Resolution 1962, recognising Ouattara as the president-elect.[459] Over the course of the crisis, the series of envoys sent by ECOWAS and the AU to mediate included the heads of state or Prime Ministers from nine countries.[460] Yet, while the conflict's management is generally remembered as straight-forward – simply convincing Gbagbo to step down in order to enable Ouattara to accede to power - the continued power imbalance in Gbagbo's favour and the

[455] Boisbouvier 2010. In an effort to counter this advantage, the EU and France helped launched radio and television channels for Ouattara's administration.
[456] Simon 2016*,* 296.
[457] Rim 2012, 692-693.
[458] In symbolic mirroring, the AU simultaneously reintegrated Guinea, which had been suspended two years earlier after the military coup led by Captain Moussa Camara after the death of President Conté.
[459] UN Doc. S/RES/1962 2010.
[460] These include Benin, Cape Verde, Sierra Leone, Kenya, Mauritania, Burkina Faso, Chad, South Africa, and Tanzania.

weakening diplomatic consensus over time meant that efforts to resolve the crisis were of particularly high stakes and their success was by no means predetermined.

Within the deadlock, each president grounded their claim to the presidency in clashing legal claims. As a result, the idea of 'legal' and 'illegal' was a matter of contestation in political discourse, meaning both Gbagbo and Ouattara treated each other as outlaws. Gbagbo's words during his inauguration speech could just as easily have been expressed by Ouattara: "They want to scare us, but they cannot expect that the legalists will surrender to those who have taken the road of illegality."[461] Since there was no clear way to arbitrate their rival legal claims to electoral legitimacy, Ouattara and other actors who sought to enforce Ouattara's victory invoked another legal vocabulary through which to view the conflict: international criminal law. Indeed, as envisioned by the UN's approach to peace-making in this "age of accountability," various actors invoked the importance of the anti-impunity norm since the very first days of the crisis.

Overall, this chapter shows how the anti-impunity norm was a salient resource used by actors to shape the political contestation, but also how the fluctuations in power and strategies shaped the way accountability for abuses was pursued.[463] As the goal shared by the Ouattara administration and the UN, AU, ECOWAS, and France was to enable Ouattara's particularly hamstrung government to reach 'full' legitimacy, the use of measures that both supported and obstructed the normative imperative to hold individuals accountable for grave abuses was deployed as one of several means to enforce Ouattara's electoral victory. Indeed, the anti-impunity norm was used to in parallel reinforce the reputation of either side as (il)legitimate members of the international community as well as shape their relative ability to exercise control over the territory. These effects were achieved by exploiting the state's centrality in the national and international administration of criminal justice, which enabled actors to take a combination of measures that both upheld and undermined the pursuit of justice for serious crimes. As a result, the way in which the anti-impunity norm was implemented did not derail efforts to end the conflict, but rather served as a resource during the bargaining process during conflict.

[461] Gbagbo 2010.
[463] Crawford and Koskenniemi 2012, 4-5.

Villainizing / Privileging Political Interlocutors

As Gbagbo's constitutional legitimacy enabled him to maintain control over political, military, and financial resources, he retained high perceived political value - making it essential to negotiate with him and convince him to cede power. However, Ouattara opposed Gbagbo's repeated calls for directly negotiating a political solution to the deadlock, either through a vote recount or through a power-sharing arrangement. Invoking the anti-impunity norm helped craft the ideational aspect of the legalistic strategy adopted by Ouattara, which involved isolating Gbagbo internationally, asphyxiating him financially,[464] and progressively reconquering administrative power.[465] Invoking the norm was indeed one of the limited means available to Ouattara to isolate Gbagbo internationally and chip away at Gbagbo's high political value to resolving the conflict.

As international criminal law is arguably the most potent legal vocabulary to identify those that are 'outlaws' of the international community, Ouattara invoked international criminal law as a discursive lifeline to shift the terms of the debate and focus on judging the legitimacy of parties based on the way in which they exercised their power, and more specifically on their respect of international law and human rights. Seeking to delegitimate Gbagbo both domestically and in the eyes of the international community, Ouattara thus used the norm's narrative-shaping function as an interpretive resource in influencing one part of the struggle for government legitimacy: the reputation of being a member of the international community. Also continuing the established practice in Ivorian politics of using accusations of human rights abuses as currency in the "politics of disqualification," Gbagbo equally used the vocabulary of international criminal law as a discursive tactic.[466] Yet, as explained below, while both leaders used the anti-impunity norm to discredit each other, both ways ultimately helped in framing Ouattara's administration from being an armed rebel group to members of

[464] In December 2010, the West African Economic and Monetary Union decided that only Ouattara's representatives would be authorised to access Ivorian accounts. The World Bank announced the suspension of its programs in Côte d'Ivoire, thereby freezing $800 million in aid and $3 billion for debt relief.[464] The International Monetary Fund also declined to work with the Gbagbo administration. On 14 January 2011, the European Union announced sanctions, including asset freezes, targeting Laurent Gbagbo along with 84 members of his entourage. On 24 January 2011, Ouattara decreed the immediate end of exports of cocoa and coffee, arguing that those who continue to finance Gbagbo's "illegitimate" government will be subject to criminal prosecutions in national jurisdictions. Boutellis 2011, 14

[465] Banégas 2011, 461.

[466] McGovern 2010, 74.

the international community, while framing Gbagbo from being a member to a dictator and rebel of the international community. At the same time, this did not have a determinative effect on his political reputation, as it did not fully discredit him as a political interlocutor until the very end of the crisis in mid-March 2011, when the increase in abuses ultimately delegitimised him.

Ouattara vs. Gbagbo

The anti-impunity norm was a particularly salient interpretive resource as it has significant emotive resonance in the Ivorian context. As McGovern explains, political legitimacy in Côte d'Ivoire "continued to be linked to keeping up the appearances of sophisticated 'civilized' behaviour," making accusations of human rights abuses "an ideal vehicle for eliminating one's political opponents from competition." Compared to other contexts, "Ivorians seem to care quite a lot about what the rest of the world thinks of them…Ivorian political actors may change their actions in response to the threat of prosecution for war crimes because they do not like to think of themselves as war criminals, and don't want others to think of them that way either."[467] This cultural traction matters since, as Nouwen notes, the likelihood of successful norm promotion increases "the more the frame within which a norm is promoted resonates with cultural traditions and narratives of the local context."[468]

Within this context of "this national-level concern with civility,"[469] in the first two weeks of the crisis on 14 December 2010, Ouattara decided to issue a re-confirmation of the Article 12(3) declaration issued by President Gbagbo in April 2003 in a bid to request ICC attention and re-establish grounds for the ICC to open an investigation. This decision was not taken in response to any particularly shocking abuse that had been committed within those first few weeks. Rather, it was aimed to swiftly change Gbagbo's reputation from 'contested president' by branding him as a 'potentially accused criminal.' A government official explained that Ouattara's decision was a means to "manage the crisis" and show the contrast between Gbagbo and Ouattara. "It was Gbagbo himself who issued [the] Article 12(3) [declaration]. The ICC tried to visit Côte d'Ivoire several times. They were not able to work because there

[467] McGovern 2010, 85-86.
[468] Nouwen 2013a, 361.
[469] McGovern 2010, 73.

were many skeletons in the closet. But Ouattara said, 'I do not have any skeletons in my closet. So, all those who wish to come are welcomed.'"[470] According to a researcher for an international human rights organization, the Ouattara administration's *de facto* self-referral was part of efforts of "trying to show respect with human rights," as he sought to remain "in line with the good graces of the international community" since, in many respects, "that was their legitimacy."[471] Ouattara's decision to re-confirm the Article 12(3) declaration mirrored exactly how then-President Gbagbo had issued the initial Article 12(3) declaration in April 2003 in the context of the civil war for the same purpose, "recruiting international allies in his attempt to do away with a bothersome set of opponents who would be exposed as illegitimate."[472]

Gbagbo's request to the ICC in April 2003 had also been made in the context of an internal armed conflict.[473] After their failed coup d'état in September 2002, the *Forces Nouvelles* rebels, led by none other than Guillaume Soro who later became Ouattara's Prime Minister, eventually took control of the northern half of the country. During this time, Gbagbo's government, namely the Presidency, was accused of running a 'death squad' to eliminate perceived enemies, which allegedly was most active in the months following the attempted coup d'état. In early 2003, the UN High Commissioner for Human Rights publicly stated that the ICC could try those responsible for the killings. Also, the French press reported on a memo written by the French Directorate-General for External Security (DGSE), which contended that there was an 80% probability that the 'death squads' operated under the instructions of President Gbagbo and/or First Lady Simone Gbagbo. Further, President of France Jacques Chirac implicitly threatened the presidential couple by saying that those supporting the 'death squads' could be brought before the ICC. In response to these allegations, Gbagbo requested the UN Security Council to refer the case of Côte d'Ivoire to the ICC so "it could send 'competent' investigators to the country, who would, he insisted, clear him. Then they could pursue the true war criminals – the rebels."[474] In the communiqué, the government notes its request "was motivated by the profound attachment of the legitimate authorities of Côte d'Ivoire to human rights and the strict observance of international human rights."[475] Realising

[470] Interview with senior official in the Ministry of Justice, Abidjan, 1 December 2015.
[471] Confidential interview with researcher for a human rights organisation, December 2016.
[472] McGovern 2010, 73.
[473] Côte d'Ivoire Article 12(3) Declaration – 2003.
[474] McGovern 2010, 72. In addition, Gbagbo also filed a libel case against two newspapers that had reproduced these accusations, ultimately winning 3,000 euros and the retraction of three articles.
[475] Communiqué, Gouvernement de la Côte d'Ivoire, March 13, 2003. McGovern 2010, 72.

there was no traction for a Security Council referral, in April 2003, President Gbagbo lodged an Article 12(3) declaration, accepting the ICC's jurisdiction beginning on 19 September 2002 – the day of the coup d'état. Thus, in a strange twist of fate, while Gbagbo's request to the ICC intended to target the rebels, who were now Ouattara's military force, Gbagbo became the target of Ouattara's request to the ICC seven years later.[476]

Through a focus on criminality, Ouattara's invocation of international criminal law also helped create a direct normative clash that undermines Gbagbo's fundamental political narrative, thereby reinforcing Gbagbo's villainization. This narrative is grounded in sovereigntism, or *souverainisme*, which exalts the national constitution as representing the sovereign will of the people, giving it superiority over international decisions.[477] Since the UN certified Ouattara's electoral victory, and Gbagbo rejected it on constitutional grounds, Gbagbo's sovereigntist rhetoric during the crisis drew upon the well-worn perception that international actors, namely France, always weaken Gbagbo's position through undue legitimation of Gbagbo's opposition.[478] This resentment against French neo-colonial influence was indeed an engrained "master trope" of Gbagbo's Ivorian Popular Front (*Front Populaire Ivoirien*, FPI).[479] For Gbagbo, another reason why France sought to weaken his position was due to his activism for multi-party democracy, since this posed a direct challenge to long-time President Félix Houphouët-Boigny – who was a very close ally of France and a key player in anchoring French influence in West Africa.[480] In 1992, Gbagbo was even arrested during a

[476] Another example of how Ivorian political leaders are concerned with their international reputation is how two key leaders reacted to being placed under an asset freeze and travel ban by the UN Security Council. Charles Blé Goudé, leader of the *Jeunes Patriotes*, reportedly visited the ONUCI offices in Abidjan on a monthly basis hoping to have the sanctions lifted, while Martin Fofié Kouakou, Commander of the *Forces Nouvelles*, stated that "the international community must take note of the fact that Ivorians themselves have decided to forgive one another." McGovern 2010, 78.
[477] Piccolino 2011.
[478] A key episode that is often invoked to support this view is the French-organised Linas-Marcoussis Accords of 2003, when members of the *Forces Nouvelles* rebel group were given the particularly powerful positions of Ministry of Defence and Ministry of the Interior. To some, this suggested that, through French involvement, the accords formalized the "process of legitimizing an armed rebellion." Charbonneau 2012, 514.
[479] McGovern 2011a, 88.
[480] President Houphouët-Boigny even coined the phrase, 'France-Afrique.' Its initial positive connotation of partnership between the countries evolved into negative connotation of France's over-involvement in domestic affairs of African states.

march against Houphouët-Boigny's government and sentenced to two years' imprisonment. The Prime Minister at the time was none other than Alassane Ouattara.[481]

As a fundamental objective of the anti-impunity norm is to limit leaders' ability to abuse civilians behind the cloak of sovereignty, invoking the 'sovereignty-piercing' considerations of international criminal law helps opponents reinterpret Gbagbo's sovereigntism as a pretext to violate both democracy and human rights. Such instrumentalization of sovereignty is exactly what the anti-impunity norm, stemming from the "age of accountability" and "sovereignty as responsibility," aims to confront and reveal as an unacceptable pretext for criminal behaviour. Viewing the crisis through the criminal lens thus depoliticizes Gbagbo's sovereigntist claims by portraying his narrative not as a political stance but rather as as a pretext for criminality. Reinterpreting his discourse as simply instrumentalising political grievances to justify criminal conduct builds the image of the dictator, ready to stay in power by all means based on spurious claims. This criminal lens, by reframing Gbagbo's sovereigntist narrative as a rejection of both democracy and "humanity's law,"[482] helps, in a sense, bring together the classic and newer visions of the anti-impunity norm in practice. As mentioned previously, transitional justice as a concept emerged during the democratic transitions from authoritarianism, particularly in Latin America, and gradually became part of responses to armed conflict. Since the beginning of the crisis, the Ouattara administration appealed to international criminal law to frame Gbagbo as an authoritarian dictator, aiming to delegitimate him as a political interlocutor.

The use of international criminal law to frame Gbagbo as anti-democratic is clear in the content of the Article 12(3) declaration confirmation, in which Ouattara's government committed to fully cooperating with the Court "regarding all crimes and abuses committed since March 2004." This date is symbolic. On 25 March 2004, an opposition protest organised by the *Forces Nouvelles* against President Gbagbo was violently repressed. According to the UN Commission of Inquiry, at least 120 civilians were killed over three days. The march "became a pretext for what turned out to be a carefully planned and executed operation by the security forces…and the so-called parallel forces under the direction and responsibility of the highest authorities of the State."[483] Reifying this historical parallel, an official from the ICC Office of the Prosecutor (OTP) explicitly recalled the March 2004 protest in a statement issued shortly before the scheduled march. Highlighting the possibility of international criminal

[481] Rosenberg 2016a.
[482] Teitel 2011.
[483] UN Doc. S/2004/384 2004, para 72.

investigations into Gbagbo-affiliated officials, the OTP official stated, "it is imperative to not let that happen again."[484] Ouattara's *de facto* self-referral was thus both retrospective and prospective: by referring to the crimes committed since March 2004, Ouattara signalled to the international community the importance of supporting Ouattara's weak yet law-abiding administration in the face of a leader who had proven to not shy from using force against his own people in an effort to quash pro-democracy movements.

In public statements, the Ouattara administration continued to link international criminal law and democracy to frame its flailing 'hotel-government' as a victim of both anti-democracy and criminal forces, capitalized on the norm's branding and villainizing effect to further the contrast between the rival leaders' (il)legitimacy. Ouattara's Prime Minister Guillaume Soro drew upon this as he painted a contrasting portrayal of Ouattara as an enlightened human-rights respecting – and legitimate - leader, comparable to figures of resistance in French cultural imaginary, versus Gbagbo as an obstinate criminal - and illegitimate - leader, comparable to the most notorious dictators, surely an exaggerated portrait. "Victor Hugo used to say 'in the face of dictatorship, revolt is allowed…In Côte d'Ivoire, as long as we face a dictator whom we now call Idi Amin Dada, I'll call on Ivorians to protest by any means in their cities, in villages, in the countryside, abroad, to resist dictatorship…We know all the murders Ceaucescu committed in Romania and the same exact thing is happening in Côte d'Ivoire."[485] Soro declared on 23 December 2010, "We strongly hope that the international community does not take too much time to realise that Gbagbo does not belong in the presidential palace, but rather at the International Criminal Court in The Hague…We are waiting for the ICC to send a mission to Côte d'Ivoire, to establish the responsibility of those involved and for those who are implicated to be transferred to The Hague."[486] Overall, the appeal to international criminal law within the context of state-sponsored repression gave "a new important advantage to the Ouattara camp" as they "succeeded in turning a bit more international public opinion against Gbagbo."[487]

Gbagbo vs. International Community

[484] Boisbouvier 2010.
[485] Vaulerin 2012.
[486] Vaulerin 2010.
[487] Pigeaud 2015, 168.

Rather than deny its importance, Gbagbo similarly appealed to the anti-impunity norm to simultaneously express his commitment to human rights and to discredit Ouattara on the basis of abuses allegedly committed by his supporters, reflecting "the commitment of Ivorians on both sides of the civil conflict to see themselves and be seen as legitimate political actors."[488] For instance, in late December 2010, Gbagbo recruited two French lawyers to defend his legalist claim to the presidency: Roland Dumas, former Minister of Foreign Affairs under President François Mittérand, and Jacques Vergès, a lawyer with extensive experience representing controversial high-profile defendants. One week later, on 7 January 2011, Gbagbo issued Presidential Decree No. 2011-06, establishing an "International Commission of Inquiry." Composed of four Ivorians and three foreigners, the Commission was mandated to investigate human rights violations related to the post-election crisis, identify perpetrators, and submit a report within one month.[489] On 31 March 2011, in a "Memorandum on alleged crimes against humanity committed in Côte d'Ivoire," Gbagbo's administration submitted allegations of abuses by pro-Ouattara forces to the ICC Prosecutor.[490] Indeed, the Gbagbo administration's contempt for the ICC's alleged bias did not stop them from requesting the court to intervene, using it as a resource to call attention to abuses by pro-Ouattara forces. Further, in May 2011, representing families of victims of the Duékoué violence, Gbagbo's lawyers filed a lawsuit in Paris against pro-Ouattara forces for alleged crimes against humanity.[491]

While these measures showing support for the imperative to hold individuals criminally accountable for grave abuses aimed to shape Gbagbo's reputation in the eyes of his constituency as a supporter of international law and member of the international community, the way in which Gbagbo engaged with the anti-impunity norm to discredit Ouattara and legitimate himself at the same time worsened his reputation "in the eyes of the world" as a political interlocutor and member of the international community. This is because Gbagbo pandered to his national audience rather than the international community by denouncing how the law was being applied.[492] Reflecting how being branding a war criminal was so damaging

[488] McGovern 2010, 67.
[489] Human Rights Council 2011a, para 44. However, this may have been mere gestural politics as the commission did not materialise. Gbagbo's Minister of Foreign Affairs did not recall the creation of the commission, suggesting its significance was minimal. Interview with Alcide Djédjé, Abidjan, 4 November and 2 December 2015.
[490] Office of the Prosecutor 2011, para 21.
[491] Cook 2011, 2.
[492] This echoes the distinction between justificatory and applicatory contestation. As Gbagbo did not contest the importance of the anti-impunity norm per se, his contestation was not

in the Ivorian political imaginary, Gbagbo simultaneously denied all allegations against his side and instead accused Ouattara and the UN of using international law as a weapon to smear his reputation and undermine Ivorian sovereignty. This approach thereby furthered the growing chasm between Gbagbo and the international community and delegitimated him further.

One particularly tense exchange between the UN High Commissioner for Human Rights Navi Pillay and General Bruno Dogbo Blé, Gbagbo's Commander of the Republican Guard, illustrates this contestation around the threat of ICC prosecution. In late December 2010, Pillay sent letters to Gbagbo and three top security advisers, reminding them of "their personal accountability for human rights abuses and infringements of international humanitarian law committed by elements of the security forces under their command and control."[493] Dogbo Blé answered swiftly by affirming his respect for international law as evidence of his legitimacy. "I am a professional of the army, instructor in international humanitarian law. I cannot allow myself to permit my men to violate human rights." Invoking the selectivity of the accusations for human rights abuses, he answered, "You can transfer me to the International Criminal Court on the basis of false and biased reports by your representative in Abidjan. But you cannot take my dignity, my sense of honour and determination to defend my country from the criminals that are portrayed by your representative as angels."[494] Dogbo Blé expressed frustration that victims of abuses by pro-Ouattara forces had lost the "game of comparative victomology."[495] Instead, he threatened to try the UN's representative "for defamation and false accusations."[496] Beyond illustrating the antagonism between Gbagbo's camp and the UN, Dogbo Blé's response highlights the concern

justificatory. Rather, as he denounced perceived bias in how the norm was being applied, his contestation was applicatory. Deitelhoff and Zimmermann 2013.

[493] UN Doc. S/2011/211 2011, para 55.

[494] "Faites-en sorte Monsieur le Haut-commissaire que le Tribunal pénal international ne soit pas un instrument de recolonisation des Africains… Vous pouvez me traduire devant le TPI [sic] sur la base des rapports mensongers et partisans de votre représentante à Abidjan. Mais, vous ne pouvez pas par contre m'enlever ma dignité, mon sens de l'honneur et ma détermination à défendre mon pays contre les criminels qui sont présentés comme des anges par votre représentante… Le rapport de votre représentante à Abidjan, tire certainement sa substance des ragots des partisans de Ouattara retranchés au Golf Hôtel et non sur des faits avérés…Je suis professionnel du métier des armes, instructeur en droit international humanitaire. Je ne peux pas me permettre de laisser mes hommes violer les droits humains." Le Nouveau Courrier 2011 also cited in UNOCI 2011.

[495] Freedman 2000, 357.

[496] UNOCI 2011.

amongst Ivorian elites to be deemed law-abiding and thus the salience of international criminal law in Ivorian discourse.

Further episodes of abuses highlight how the Gbagbo camp did not wish to be seen as denying the importance of international criminal law, but rather played to his base by arguing that international criminal law was being abused to tarnish the reputation of Gbagbo's forces. For instance, on 20 December 2010, Gbagbo's Minister of the Interior refuted allegedly biased reports of serious human rights violations, arguing that the UN High Commissioner for Human Rights failed to mention that 14 members of the state security forces had been killed by Ouattara's supporters.[497] Also, in response to the attacks on women's marches in March 2011, the Gbagbo administration denied the responsibility of their forces, arguing the allegations lack factual basis. "Despite our sincere respect towards the memory of these women, victims of an acts from another era, the DFS purely and simply reject the accusation, truly fallacious and baseless. The Chief of the General Staff of the Armies further requests the accusers to find the alleged perpetrators of these killings, as the FDS [DSF] were not operational in Abobo on that day."[498] Again, on 8 March 2011, Gbagbo's Council of Ministers dismissed the accusation that the DSF had killed seven women as "without foundation" and a "pure montage."[499] This counter-narrative claimed the video footage had been fabricated, the witnesses were "pseudo-witnesses," and the victims were actresses covered in fake blood.[500] Another key event, which would also form part of the ICC case against Gbagbo and Blé Goudé, was the bombing of a market in Abidjan by pro-Gbagbo forces on 17 March 2011, killing at least 40 people. Gbagbo's spokesperson claimed it was "a true conspiracy" as the "regular security forces" were not in that neighbourhood on that day. "It is clear that there is a synergy between the UN, France, and the rebels against Côte d'Ivoire."[501] Moreover, though it showed Gbagbo's legalistic approach, hiring Vergès to defend Gbagbo against claims of international crimes worsened the optics of his illegitimacy, as Vergès had defended or advised notorious political leaders, including Klaus Barbie ("The Butcher of Lyon"), Slobodan Milosevic, Saddam Hussein, Khieu Samphan, Moussa Traoré, and Idriss Déby. Gbagbo's lawyers' decision to visit a hospital and meet with victims of an alleged attack by UN peacekeepers further illustrates how they appealed to international criminal law not to enhance Gbagbo's reputation in the eyes

[497] Human Rights Council 2011a, para 43.
[498] Abidjan Net 2011a.
[499] Prosecution's Pre-Trial Brief, para 281.
[500] Notin 2013, 289.
[501] Le Monde 2011.

of the international community but rather, to display his support for the anti-impunity norm and cast a spotlight on alleged hypocrisy of how the norm is applied and thereby boost Gbagbo's narrative as the legitimate leader within his own domestic constituency.

While Gbagbo portrayed himself as criticising the way in which accusations of human rights abuses were being used, rather than criticising the value of law and the anti-impunity norm itself, the way in which he did so was deemed disingenuous and thereby devastating for his international reputation as a legitimate political interlocutor. For instance, key diplomats increasingly compared Gbagbo's and Ouattara's approaches to accountability as they assessed the leaders' legitimacy comparatively, or relationally. Comparing their reactions to the 16 December 2010 march, Ambassador Simon writes in his book, "[t]he presidential clan…was determined to keep power by all means, including through force." Several paragraphs later, Simon notes he "was struck to observe that, in this terrifying escalation of violence, the supporters of Alassane Ouattara maintained their calm, in the image of their leader who wanted at all costs to avoid shedding the blood of his fellow citizens."[502] Highlighting Gbagbo's international reputation, Simon writes that Gbagbo probably "didn't imagine he would end up as the bad guy."[503] In mid-January 2011, President Sarkozy reportedly stated that Ouattara "is not a warrior, he's a nice guy. We cannot expect any brutal actions from him."[504] For Colonel Héry, defense attaché at the French embassy in Abidjan, "Gbagbo had chosen the path of the dictators."[505] Yet, the way in which Gbagbo's denialist attitude delegitimated him in the eyes of the international community and caused him to lose status as a political interlocutor was not entirely straightforward. In light of his high political value for most of the crisis, he maintained his status as a political interlocutor and the UN, France, the AU, and ECOWAS continued to negotiate with him over the next few months.

Further, rather than completely weaken support for him internationally, cracks in the international consensus around the need for Gbagbo to cede power started to appear even after this villainization. Though the AU and ECOWAS had initially agreed to demand that Gbagbo

[502] Simon 2016, 310.
[503] Simon 2016, 296.
[504] Notin 2013, 245.
[505] Notin 2013, 339. Also, SRSG Choi even began to view Gbagbo as not only criminal but unable to think rationally. For instance, in December 2010, Choi noted "numerous facts and anecdotes proved that he no longer benefitted from full capacity for judgment." Choi 2015, 24. Gbagbo "could no longer discern what was good or bad for him…He had lost contact with reality." Cherruau and Khady Sé 2011.

fully cede power, these bodies began to diverge around January 2011. While ECOWAS was "growing increasingly impatient with Gbagbo's prevaricating and brinkmanship," the AU "became more circumspect of international intervention and focused on a negotiated settlement."[506] In a "coup de théâtre" on 21 January 2011, President of South Africa Jacob Zuma questioned the validity of the electoral results and instead supported a power-sharing solution.[507] Fissures also emerged within ECOWAS in January 2011.[508] Overall, detractors included the presidents of Ghana, Gabon, Uganda, The Gambia, Mauritania, Zimbabwe, and Libya.[509] These intra-African schisms provided Gbagbo "some sort of mitigated legitimacy."[510] Promoted by South Africa, a power-sharing arrangement, which involved rotating power with a 24-month period for each of the 'two presidents,' became an increasingly viable option.[511]

While Gbagbo retained his high political value and a limited but not insignificant amount of support among several African states, the series of highly-mediatised human rights abuses in mid-March 2011 by pro-Gbagbo forces, exacerbated by his refusal to hold the perpetrators accountable, concretized his delegitimation as a political interlocutor and caused him to finally lose support the diplomatic support of key allies. This was evident in diplomats' personal accounts. In his account of the March 2011 events, Choi compares Gbagbo and Ouattara's approaches to urban guerrilla warfare. Choi asked Ouattara whether his party would arm its youth, to which the Ouattara camp responded "they would not." Choi then writes, "On the other side, the survival strategy of Gbagbo loyalists was clear: first, pay the civil servants and military by any means possible, then, dislodge Ouattarist elements from Abidjan by organising demonstrations by the *Jeunes Patriotes* and by mobilising their forces."[512] For Choi,

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[506] Hunt 2015, 702; Lotze 2011, 365-375.
[507] Charbonneau 2012, 518; Darracq 2011, 366.
[508] According to James Victor Gbeho, head of ECOWAS, "the solidarity that started among us in the international community is fast being eroded…we find that others are encouraging Gbagbo not to yield…Any attempt to change the result that the Ivorian electorate have out of their own free will mandated, it's something that we should all regret, and I do hope that it will not come to that in the final analysis." RNW 2011
[509] McGovern 2011a, 212. In early January 2011, Ghanaian President John Atta Mills "surprised Western diplomats" indicated that he would remain neutral, opposed military action to oust Gbagbo, and refused to supply any troops for an ECOWAS intervention. Charbonneau 2012, 518.
[510] McGovern 2011b.
[511] ICG 2011**;** Darracq 2011, 369-370. Even detractors within the French Ministry of Foreign Affairs argued that the elections were not conclusive. According to the former Sub-Director of the West Africa bureau, "Gbagbo did not win the elections." Interview with former member of the French Ministry of Foreign Affairs Laurent Bigot, Paris, 25 May 2016; Bigot 2016.
[512] Choi 2015, 257 – 258.

"it was clear that Ouattara was gaining the upper hand. The only thing left was to gain the hearts of the Ivorian people. For the Gbagbo camp, who had perpetrated many abuses against the civilian populations, this was no longer possible."[513] According to Ambassador Simon, with the two attacks on the women's marches in March 2011, "Gbagbo had passed a threshold. We could no longer negotiate with him."[514] After the 17 March 2011 attack on the Abobo market, Simon further noted that Gbagbo chose "savage repression over wise renunciation," meaning he no longer had any excuses and "nobody could defend him."[515] Simon continued, "It was too much… France and the UN denounced crimes against humanity." He specifically pointed out that "the spokespeople for Gbagbo tried to exonerate themselves, pretending, unscrupulously and in contempt of victims and their families, that the visual evidence had been fabricated."[516] Rejecting the doubts raised by Gbagbo's administration as to who was responsible for the killings, a French presidential advisor on Africa "had no doubt as to who fired the shot."[517] For the commander of the Licorne forces, the Abidjan attacks were a "flagrant sign of the moral bankruptcy" of the Gbagbo camp.[518]

Concern over Gbagbo's role in the deteriorating human rights situation contributed to the AU's decision on 10 March 2011 to finally recognise Ouattara (again) as the president-elect, ending the offers to negotiate a power-sharing arrangement. Several days prior to the AU's communiqué, AU envoy Jean Ping was in Abidjan on the day of the attack against the women protesters on 5 March 2011. According to Simon, the "inexcusable events in Abobo weighed heavily in their condemnation of Gbagbo's downward spiral."[519] In its communiqué, besides the generic condemnation of "all atrocities and other violations of human rights, threats, and acts of intimidation," the AU also particularly noted "acts of obstruction directed at the operations of the UNOCI" – an implicit yet clear reference to acts by pro-Gbagbo forces.[520]

[513] Choi 2015, 258.
[514] Interview with former Ambassador Jean-Marc Simon, Paris, 25 May 2016.
[515] Simon 2016, 309.
[516] Simon 2016, 312.
[517] Notin 2013, 291.
[518] Notin 2013, 292. For Colonel Héry, the denial of responsibility for abuses was "a classic attitude. Every time, they weren't responsible." Notin 2013, 333.
[519] Simon 2016, 312.
[520] African Union Peace and Security Council 2011a.

Overshadowing Abuses by Pro-Ouattara Forces

While Ouattara drew upon accusations of human rights abuses to frame the illegitimacy of Gbagbo as a political interlocutor since the very beginning of the crisis, he also benefitted from the growing need towards the end of the crisis to be viewed as legitimate, helping overshadow abuses committed by his own forces. As pro-Ouattara forces gained strength and moved southwards towards Abidjan, they were increasingly accused of grave abuses beginning in March 2011. As mentioned earlier, the most lethal episode of the conflict happened in Duékoué where, on 29-30 March 2011, *Forces Nouvelles* fighters, who had recently been renamed the *Forces Républicaines de Côte d'Ivoire* (FRCI), and other pro-Ouattara fighters allegedly killed several hundred people.[521] According to a report conducted by ONUCI, "certain victims were clearly executed while fleeing…. Bodies were [also] discovered laying on their stomach, likely indicating that they had been killed from behind. Others had had their throats slit or been burned alive. Women, children, and the elderly also figured among the victims."[522] The Duékoué massacre was troublesome for Prime Minister and Minister of Defense Guillaume Soro, who was a long-time leader of these rebel-turned-army forces and was present in the area when the offensive took place.[523] However, the alleged responsibility of pro-Ouattara forces did not receive much attention at the time, reflecting the selectivity in the use of the anti-impunity norm to villainize alleged offenders. For instance, in the UNSC Resolution 1975, passed on 30 March 2011, beyond generic condemnation against all violations of international human rights and humanitarian law, no direct reference was made to abuses by pro-Ouattara forces, even in the wake of the Duékoué massacre that took place two days earlier. According to a researcher for an international human rights organisation, "publically, there was very little reaction" to the Duékoué events.[524] There was indeed strong desire to avoid bad press during the crucial final days of the crisis in late March 2011, when preparations were being made for UNOCI and France to help the FRCI remove Gbagbo through forceful means. Diplomats were reportedly livid and "went ballistic" at the timing of

[521] Human Rights Council 2011b, para 23; Corey-Boulet 2011. According to an Amnesty International researcher, "several hundred young men were picked out and killed" based on their Guéré ethnic origin "because they were considered to be supporters of Laurent Gbagbo, even though those militias had left the town." Chatelot 2011.
[522] UNOCI – Human Rights Division 2011. English translation from HRW 2012.
[523] Hofnung 2011, 167.
[524] Interview with researcher from a human rights organisation, 30 December 2016.

reports on abuses by pro-Ouattara forces, as it jeopardised their strategy that was already controversial due to its undertones of regime change.[525]

When these crimes were mentioned later, the alleged criminal responsibility by pro-Ouattara forces was obscured and the violence was simplistically attributed to long-standing community-based and seemingly uncontrollable rivalry. For instance, the report of the AU Chairperson of the Commission on the situation in Côte d'Ivoire, published on 21 April 2011, does not highlight alleged perpetrators but rather states that "[S]ome localities, notably Duékoué, were first the scene of *inter-tribal confrontations*, before being subjected to the *horrors of war* during the offensive launched by the FRCI."[526] Further, despite reported abuses committed by the Invisible Commando in Abidjan, the AU report only portrayed them as saviours. "Subsequently, an armed group, known as "commando invisible" (invisible commando), came to the rescue of populations of Abobo by attacking pro-Gbagbo forces, which did not hesitate to use heavy weapons against the civilian population."[527] Also, in his book, then French Ambassador Simon dismissed the allegations of abuses as reprisals linked to historic, deeply embedded, and intractable inter-ethnic rivalry. "After the FRCI's victory following difficult hostilities in the west of the country, horrifying communitarian score-settling occurred after the FRCI's passage, between 'autochtone' pro-Gbagbo militias and 'allogène' populations... We are confronted with one of the dramas that reveal the root causes that regularly plunge these regions of Côte d'Ivoire into mourning."[528] The violence was indeed partly based on competition between "frustrated landowners and foreign tenants who claimed ownership of land to which they had added value," and was fuelled by accumulated resentment at unpunished violence in that area for nearly a decade.[529] However, Simon wrote in 2015 that "serious investigations should allow us to know exactly what happened and who is responsible."[530] This overlooks reports by the UNOCI,[531] the International Commission of Inquiry,[532] and human rights organisations[533] that all point to some degree of responsibility by the pro-Ouattara forces. In this sense, blurring the criminal lens helped frame the *Forces*

[525] Confidential Interview with researcher from a human rights organisation.
[526] African Union Peace and Security Council 2011b [emphasis added].
[527] African Union Peace and Security Council 2011b.
[528] Simon 2016, 332.
[529] ICG 2014, 12-13; Klaus and Mitchell 2015.
[530] Simon 2016, 315.
[531] UNOCI – Human Rights Division 2011.
[532] Human Rights Council 2011b.
[533] HRW 2011.

Nouvelles not as a rebel group who had been frequently accused of abuses throughout the eight years of its control of the north, but as a national army.

Overall, while both sides used accusations of human rights abuses "as ammunition in the political struggle against their adversaries,"[534] invoking international criminal law helped the Ouattara administration translate a complex crisis into a narrative of one man's dual political and criminal responsibility for the crisis. This narrowing of the narrative through a criminal lens helped overshadow other underlying factors that contributed to the recurring outbreak of political violence. The two arguably most significant of these underlying factors include reforms to the Constitution, especially around key rules of eligibility for presidency and voting rights which perpetuated the perennial debate of what constitutes Ivorian-ness,[535] and the use of militias to capture power including through persecution based on perceptions of who is 'truly' Ivorian. While expedient for creating a particular narrative, this narrowing of the narrative should nevertheless be viewed with caution, as the spotlights and shadows it creates can exacerbate challenges of overcoming the fundamental drivers of the conflict in the long term.

Coercive Leverage

Beyond shaping the reputations of political interlocutors as supporters of international law and thus legitimate members of the international community, the anti-impunity norm was used as a means of coercive leverage to pressure and incentivise Gbagbo to cede power and help the Ouattara government overcome its main weakness - lack of effective control over the entire territory. More specifically, even before serious human rights abuses were committed, the norm served to draw a 'red line' in order to illustrate a threshold between illegality and criminality, impressing upon Gbagbo that crossing this threshold would trigger Gbagbo's transition from contested legality to criminality. Recognising Gbagbo's high political value in reaching a political settlement throughout most of the crisis, international mediators actively applied the norm coercively through threats of prosecution while also extending the promise of amnesty and 'golden exits.' Indeed, despite the steady increase in abuses, the Ouattara

[534] McGovern 2010, 73.
[535] For more on the manipulation by successive Presidents of the Constitution for political ends, see Akindès 2008; Piccolino 2014; Bouquet 2011; and Bovcon 2013.

administration and international mediators exploited the state's centrality in the national and international administration of criminal justice to navigate the flexibility of the normative prohibition against amnesty for grave abuses in order to threaten Gbagbo based on a shifting and fluid red line.

'Carrot and Stick' Approach

Since the very first days of the crisis, the threat of prosecution and the promise of impunity were used as a mediation tool, in parallel with political and economic sanctions imposed on Gbagbo's administration, to regulate the power relations between both parties and break the deadlock. Even before Ouattara lodged an Article 12(3) declaration on 14 December 2010, and before the UN certified the results issued on 2 December 2010 by the Independent Electoral Commission, UN SRSG Choi invoked the threat of prosecutions at the ICC to pressure Gbagbo and the Constitutional Council to not announce any rival results. On 1 and 2 December 2010, SRSG Choi met with Gbagbo, the Minister of Interior Désiré Tagro, diplomatic advisor and future Minister of Foreign Affairs in Gbagbo's government Alcide Djédjé, and President of the Constitutional Council Paul Yao N'Dré. SRSG Choi reportedly warned them of the threat of an ICC investigation if the Constitutional Council were to invalidate the UN-certified results. Drawing a parallel with the situation in neighbouring Guinea, Choi warned, "The proclamation of results by the Constitutional Council will most likely trigger mass street protests that will represent a challenge for the security forces. This may cause numerous victims…The dramatic events in Guinea triggered regime change and ICC intervention."[536] In a meeting the following day, highlighting the red line between contested legality and criminality, Choi again warned of an ICC intervention "if the number of deaths was unacceptable" and that repression of opposition demonstrations "would trigger individual sanctions and, if need be, would open the door to an ICC intervention." Tagro then reportedly retorted, "Let's go together to the ICC, you and I!" Choi responded, "Yes, you as the accused, myself as a witness."[537] Following the Constitutional Council's announcement of

[536] Choi 2015, 176. The repression of opposition protests in September 2009, which killed over 150 protesters, triggered the opening of an ICC preliminary examination in October 2009. Reinforcing this threat, ICC Deputy Prosecutor Bensouda had visited Guinea only three weeks earlier as part of the preliminary examination. Office of the Prosecutor 2010b.
[537] Choi 2015, 177-178.

its results on 3 December 2010, Choi again asked Gbagbo's close associates, "Will you kill as many people as possible before you are killed yourselves or dragged before the ICC? Will it be, '*après moi le déluge'*?" His interlocutors reportedly told him that Gbagbo "did not envisage perpetrating a bloodbath" but "the security forces would never let Ouattara seize power."[538] Similarly, when a high-level Ivorian military official explained to the Commander of Operation Licorne, General Palasset, that he was bound by the constitution to follow Gbagbo's orders, Palasset reportedly responded, "[B]e careful, there was already Rwanda; the international community will not remain passive, you all run the risk of appearing before the ICC."[539] The ICC rendered this threat more credible by issuing a series of early statements that reminded the government that the ICC was monitoring the situation in Côte d'Ivoire. Viewing Gbagbo's decision to stay in power as "announcing the possible commission of future crimes," the ICC's statements were issued pursuant to the Court's objective to deter the Gbagbo administration from committing abuses and to pressure the government to take measures to prevent the commission of abuses, including by ceding power.[540] The potential for an ICC investigation was rendered even more credible when, on 14 December 2010, Ouattara reconfirmed the Article 12(3) declaration, recognising the ICC's jurisdiction over Côte d'Ivoire since March 2004.

The cautionary threats, however, were unsuccessful in both dissuading the Constitutional Council from announcing rival results and in deterring security forces from repressing an opposition march. During the march on 16 December 2010, state security forces allegedly killed 45 persons, raped at least 16 women and girls, and wounded at least 54 persons.[541] The march became a key episode in the crisis and would later be the subject of charges of crimes against humanity at the ICC.[542] On 17 December 2010, President of France

[538] Choi 2015, 199.
[539] Notin 2013, 230.
[540] On 2 December 2010, Deputy Prosecutor Bensouda emphasised that "all acts of violence will be monitored and meticulously and closely studied by the Office to determine whether crimes falling under the jurisdiction of the Court have been committed and justify an investigation." Office of the Prosecutor 2010c On 7 December 2010, referring to Gbagbo's decision to stay in power, Prosecutor Moreno Ocampo stated, "Ivory Coast today is announcing the possible commission of future crimes… So in terms of prevention, the time to act by the state is now." Aljazeera 2010.
[541] Decision Confirmation of Charges Against Laurent Gbagbo, paras 271-273.
[542] In further threats of prosecution, the UN High Commissioner for Human Rights Navi Pillay warned on 19 December 2010 that "there will be consequences for those who have perpetrated or orchestrated any such actions or do so in the future." UN News 2010

Sarkozy explicitly threatened ICC prosecution, drawing on Gbagbo's background as a historian and his concern for his own political legacy.[543] Invoking the red line, Sarkozy declared, "If, before the end of the week, Laurent Gbagbo does not leave the post he occupies in violation of the will of the Ivorian people, he will be placed under sanction…It is up to him to decide what image he wants to leave in the history books. If he wants to leave the image of a man of peace, he still has time – but time is of the essence and he must leave. Or does he want to leave the image of someone who fired at perfectly innocent civilians? And, in this case, there are international jurisdictions and an [international] criminal court. The Prosecutor [of the ICC] himself indicated that he was closely following the situation and that those who were responsible for firing would be held responsible."[544] This echoed how SRSG Choi also appealed to Gbagbo's background as a historian to discourage him from requesting the Constitutional Council to issue different results, reportedly stating "Mr. President, if you take this fatal decision, what will be your place in history?...If your decision provokes hundreds of killings, destruction, and suffering for the Ivorian people, what will be your place in history?"[545] Gbagbo reportedly responded, "A bloodbath is not an option for me. But, at the same time, I will not abdicate for fear of a possible bloodbath."[546]

In parallel to threats of prosecution, offers of protection from prosecution were made to Gbagbo throughout the crisis. Illustrating the exploitation of the norm's enforcement features, these offers were premised on the idea that the state's centrality in the national and international administration of justice could guarantee such impunity arrangements, as the state could suspend national prosecutions and block the enforcement of any eventual ICC arrest warrant through non-cooperation. Some offers were made implicitly in the form of a 'golden exit.' For instance, in two letters sent in December 2010, President of the United States Barack Obama reportedly invited Gbagbo to the White House to discuss "how to advance democracy in the region, laying out a role he could play" should he cede power and suggested that Gbagbo could "move to the US or receive a position in an international or regional institution if he left peacefully."[547] The Obama administration also reportedly offered Gbagbo a university

[543] Gbagbo received a PhD in History in 1979 from Université de Paris VII, entitled "Les ressorts socio-économiques de la politique ivoirienne: 1940-1960." According to a presidential advisor, Sarkozy "tried to appeal to his conscience of head of state, to the historical legacy he would leave behind." Notin 2013, 237.
[544] Le Monde 2010.
[545] Cherruau and Khady Sé 2011.
[546] Choi 2015, 176.
[547] Sheridan 2011.

position, in light of his academic past.[548] Simultaneously, the administration noted it "would support efforts to isolate Gbagbo and hold him to account if he refused to step down."[549] According to Gbagbo's Minister of Foreign Affairs, France offered its support to arrange for Gbagbo to be president of the International Organisation of la Francophonie.[550] Similarly, France also assured Gbagbo that peaceful relinquishing of power would be rewarded by the international community. According to presidential advisor Jean-David Levitte, President Sarkozy reportedly explained to Gbagbo, "If you leave without making any problems, I am sure that the international community will ensure that you have a privileged status, with sufficient resources and guaranteed security. It is exactly what we will offer to Qaddhafi."[551] These offers were not tantamount, according to Ambassador Simon, to explicitly offering to protect Gbagbo from prosecution.[552]

Other offers were made more explicitly, even in the wake of highly-mediatised increase in abuses. In early December 2010, AU envoy Thabo Mbeki extended the offer of amnesty as an incentive for Gbagbo to cede power. On 22 December 2010, a few days after the opposition march, Choi offered the "Kérékou Option," named after the proposal made in 1991 to former president of Benin, Mathieu Kérékou. Accordingly, Gbagbo could accept amnesty and step down in anticipation of running again in the 2015 presidential elections, capitalising on his legacy of having avoided further bloodshed by ceding power despite his disagreement with the UN-certified results. Former President Kérékou himself reportedly told Gbgabo to "leave power, before power leaves you."[553] On 28 December 2010, ECOWAS sent the heads of state of Sierra Leone, Benin, and Cape Verde to Côte d'Ivoire. Explaining that amnesty was still on the table, President of Benin Boni Yayi stated, "The goal of our mission is to have president Gbagbo understand that it is in his interest to leave power with honour. He can benefit from amnesty, with the possibility of coming back in five years, as Kérékou did in 1996. This option is the only one available for Laurent Gbagbo."[554] In early January 2011, the AU envoy Prime Minister of Kenya Raila Odinga also noted that Gbagbo "wants amnesty, he wants to know

[548] Simon 2016, 294.
[549] Reuters 2010.
[550] Interview with Alcide Djédjé, Abidjan, 4 November and 2 December 2015.
[551] Notin 2013, 228. In hindsight, the comparison to Qaddafi proved more prophetic than it was intended at the time, as Qaddafi was the target of an ICC arrest warrant in the context of an internal armed conflict and was eventually killed following French-led military intervention.
[552] Interview with former Ambassador Jean-Marc Simon, Paris, 25 May 2016.
[553] Choi 2015, 229.
[554] Choi 2015, 231.

he's safe if he chooses to stay."[555] Ouattara said he would not force Gbagbo to leave the country and would issue him an amnesty and the status of a former head of state.[556] In January 2011, the US Assistant Secretary of State for African Affairs Johnnie Carson stated that they held Gbagbo fully responsible for the crisis and the violence, reiterated its opposition to any power-sharing agreement, and insisted instead that the US and other countries have offered Gbagbo a 'dignified exit,' implying amnesty. Referring to the shifting red line, "the longer the crisis goes on, the more likely this option will disappear."[557] Further, on 9 January 2011, ECOWAS envoy Obasanjo used the threat of international criminal prosecution as a means to pressure Gbagbo to accept the incentives of amnesty, exile abroad, and a monthly stipend if he chooses to step down.[558] According to SRSG Choi, Obasanjo warned Gbagbo to not cross the red line into criminality. "Let's be serious, here is my counter-proposition: you need to leave, and amnesty is the only discussible issue, on the condition that you do not commit any crimes against humanity. However, I was told that you are not far from doing so. Be prudent, think of what happened to Charles Taylor and his associates. If you cross the red line, you will be chased as long as you live and wherever you are."[559]

This practice of threatening prosecutions while extending amnesties, despite the commission of abuses that would eventually be confirmed as charges of crimes against humanity, continued at the AU meeting in March 2011. The AU recognised Ouattara as president and, endorsing the conclusions of the AU High Level Panel, called on Ouattara to negotiate a power-sharing arrangement with the opposition – though without Gbagbo. The difference between the draft and final version of the AU communiqué shows how the weight of the consensus against amnesties for international crimes made actors change the offer of amnesty from being explicit to implicit and still retain the inducement of amnesty. Indeed, the AU High Level Panel recommended the adoption of an amnesty covering "all acts and offences committed in relation with the post-electoral crisis" and providing "full immunity for all those who held the office of President of the Republic or that of Prime Minister, as well as senior officers of the Armed Forces and Security Services."[560] This amnesty was included explicitly

[555] CNN 2011.
[556] Notin 2013, 251.
[557] Cook 2011, 46.
[558] CNN 2011.
[559] Notin 2013, 238.
[560] African Union 2011.

in a draft version of the AU communiqué proposal.[561] However, indicative of how explicit amnesties are no longer acceptable, the final version made the offer implicitly by referring to the need to ensure "all the necessary guarantees for all concerned actors, in particular for the outgoing President, His Excellency Laurent Gbagbo."[562] Asked whether this covered crimes against humanity, war crimes, and genocide, Gbagbo's Minister of Foreign Affairs, who attended the AU meeting, noted, "The African Union did not specify the parameters. Except for economic crimes, the authors would not be pursued."[563] Ouattara later confirmed this offer, by stating "Gbagbo will have an honourable exit."[564] Asked whether France would have supported such a general amnesty, despite the human rights abuses carried out over the past few months, Ambassador Simon noted, "Of course – you have to encourage leaders to accept peace." Asked whether this strategy of offering amnesty as well as requesting ICC intervention was contradictory, Simon referred to its use as a line between illegality and criminality. "It was to express that, if you do not accept amnesty now, there would no longer be an option later."[565] While other agreements sometimes include perfunctory clauses regarding the need to prosecute crimes under international law, even amidst a general understanding that the target would not be prosecuted, this communiqué did not include such a clause, thereby signalling to Gbagbo that he would not be prosecuted and reflecting Gbagbo's continued perceived high political value to resolving the conflict peacefully. The use of "all the necessary guarantees" as a euphemism for general amnesty shows how ambiguous language in the text of political agreement can simultaneously acknowledge the consensus against explicit offers of general amnesties while signalling the duty to prosecute will not be enforced. In sum, the threats of prosecution combined with the series of offers of de facto amnesty and the ambiguous language in the African Union's 10 March 2011 communiqué reflect how both international mediators and the Ouattara administration capitalised on the state's centrality in the national and international administration of justice in order to pressure and incentivise Gbagbo to cede power.

[561] On file with author. Interview with Alcide Djédjé, Abidjan, 4 November and 2 December 2015.
[562] African Union Peace and Security Council. PSC/AHG/COMM.1(CCLXV).
[563] Interview with Alcide Djédjé, Abidjan, 4 November and 2 December 2015.
[564] Stearns 2011.
[565] Interview with former Ambassador Jean-Marc Simon, Paris, 25 May 2016.

Mobilisation for Neutralisation

There is an Ivorian saying: "when two men are having a fistfight, you must first wait until it is clear which one is going to win, and then you must step in before someone gets really hurt."[583] This moment arrived in mid-March 2011. In light of the failure of the successive diplomatic offers to convince Gbagbo to step down, and in light of the heightened abuses carried out by his security services in March 2011, Gbagbo's previously high political value as an interlocutor in finding a solution to the crisis weakened drastically. According to the French army Chief of Staff, "I think it was the day that Gbagbo bombed the Abobo market that the President of the Republic [Sarkozy] realised there was no longer a political exit strategy, no escape route for Gbagbo, and that an armed intervention was, from then on, inevitable."[584] In the same vein, the SRSG Choi noted that the March attacks "scandalised international public opinion and contributed to our decision to launch aerial strikes against these heavy weapons."[585] Attacks by pro-Gbagbo forces on the Golf Hotel and UNOCI's headquarters thus "provided the international community the ideal pretext to silence [Gbagbo] definitely."[586]

In light of Gbagbo's lowered political value to ending the conflict by diplomatic means, key actors adopted a more robust approach towards excluding Gbagbo. In this shifted context, the issue of justice was increasingly high on the agenda, as it revolved mainly around Gbagbo's fate.[587] Exploiting the anti-impunity norm ultimately helped actors neutralise the Gbagbo-affiliated opposition through a legalist exit strategy. More precisely, invoking the duty to respond and prosecute international crimes was used to both encourage the adoption of UN Security Council Resolution 1975 (2011), which set the stage to neutralize Gbagbo by force, as well as to prepare plans to transfer Gbagbo to the ICC. In this sense, though no indictments were issued before the end of the post-electoral crisis, Ouattara, in coordination with France, drew upon the normative imperative that Gbagbo should be held accountable for his alleged crimes to neutralise him by force and by law, ultimately enabling the Ouattara administration to finally gain effective control over the country.

[583] McGovern 2011a, 209.
[584] Notin 2013, 297.
[585] Choi 2015, 270.
[586] Notin 2013, 321.
[587] Hunt 2015, 700.

Invoking the imperative to respond to and prevent further human rights abuses helped overcome resistance among UN Security Council members to a resolution that would authorise military intervention against a contested 'legal' president, tantamount to regime change in some actors' views. To mobilise the adoption of Resolution 1975 on 30 March 2011, French lobbying directly invoked the normative expectation of "sovereignty as responsibility" and, by extension, the Responsibility to Protect doctrine. According to General Puga, President Sarkozy pressured his interlocutors to accept the Security Council resolution, telling them, "How long will you stay seated, arms folded, without reacting? Do you want to be accused later of having not assisted a population at risk?"[588] French actors thus invoked the anti-impunity norm to make the distinction between a 'legal' and 'responsible' government particularly salient, and to convince others that even a 'legal' government is not legitimate if it uses heavy weaponry against its own people. According to presidential diplomatic advisor Jean-David Levitte, there had indeed been some debate in the Council regarding Gbagbo's legitimacy. Explaining his lobbying strategy, Levitte stated, "If the Gbagbo government is legal, it is not abnormal that it [the government] acts to restore order. However, no government can be legitimate if it uses heavy weapons against its population."[589] Reflecting this imperative to curtail Gbagbo's ability to harm civilians, the resolution added a key clause to UNOCI's existing authorisation under Chapter VII to "use all necessary means to carry out its mandate to protect civilians under imminent threat of physical violence." The resolution added, "including to prevent the use of heavy weapons against the civilian populations." Though the resolution was portrayed as simply authorization to use military force to curtail Gbagbo's ability to use heavy weaponry and protect civilians, it was understood as authorization to finally neutralise and arrest Gbagbo through legal means, due to his responsibility for the continuation of the crisis and the commission of crimes against civilians. As France's Permanent Representative to the UN Security Council Gérard Araud explained, Resolution 1975 was "the only way to avoid a fully-fledged civil war and, perhaps, a bloodbath in the streets of Abidjan" and had one "very simple" message: "Gbagbo must go."[590]

But, go where? While the Responsibility to Protect doctrine helped undermine Gbagbo's contested legitimacy and convinced UN Security Council members to approve the resolution unanimously, the related responsibility to *prosecute* provided a way to end the crisis

[588] Notin 2013, 299.
[589] Notin 2013, 300.
[590] Notin 2013, 298.

by neutralising Gbagbo. Capitalizing on the state's relatively central position within the ICC system, the Ouattara administration, supported by France, took various steps from the first days of the crisis to lay the groundwork for the opening of ICC investigations thereby anticipating a legalist exit strategy for his rival by transferring him to the ICC. Indeed, by proactively waiving the sovereignty-accommodating elements of the Rome Statute, namely the primacy of national jurisdictions, the Ouattara administration showed how it interpreted complementarity not as a simple admissibility test but rather as a burden-sharing strategy to gain advantage in exercise effective control over the territory.

Since the beginning of the crisis, the Ouattara administration sought to overcome obstacles in opening an ICC investigation. As it had not yet ratified the Rome Statute and officially become a State Party, Côte d'Ivoire could not formally issue a territorial state referral, or self-referral.[591] For investigations to be opened, this would either have to be done via the Prosecutor's *proprio motu* powers, a third-party state referral, or a UN Security Council referral. Capitalising on the state's centrality in the Rome Statute system, the embattled Ouattara administration, with France's support, encouraged the ICC to open an investigation *proprio motu* by making clear that it would provide full cooperation and would not contest the admissibility of its cases. Within two weeks of the elections, and before the events could reasonably meet the gravity threshold for ICC's jurisdiction, Ouattara lodged an Article 12(3) declaration in desperation regarding his utter weakness rather than in response to any grave human rights abuses that had been committed by either side. According to Prosecutor Moreno Ocampo, in a conversation three days earlier, Ouattara called him and "explained the drama of this situation, how Gbagbo's soldiers were surrounding his hotel."[592] In the Article 12(3) declaration issued on 14 December 2010, Ouattara committed to providing full cooperation with the ICC and indicated his administration's intention to become a State Party at the earliest opportunity.[593] While then Ambassador of France explained that France "did not see any problem" with Ouattara's decision,[594] a former official of the Quai d'Orsay stated that France

[591] Ouattara's administration reconfirmation of acceptance of the ICC's jurisdiction via the Article 12(3) declaration in December 2010 and in May 2011 are not formally and legally equivalent to a state self-referral. The domestic political turmoil during the crisis obviously blocked any potential ratification of the Rome Statute.
[592] Interview with former ICC Prosecutor Luis Moreno Ocampo, Oxford, 12 May 2018.
[593] Article 12(3) Declaration – 2010.
[594] Interview with former Ambassador Jean-Marc Simon, Paris, 25 May 2016.

rather "strongly encouraged" Ouattara's administration to request ICC intervention.[595] France declared its readiness to cooperate with the ICC as early as January 2011.[596]

Further, on 9 March 2011, Ouattara's lawyers submitted a 40-page memorandum to the ICC that sought to encourage the opening of ICC investigations. Indicating that the Ouattara administration would not contest the admissibility of cases, the memorandum highlighted the inability of the Ivorian judicial system to conduct proceedings.[597] Declaring the Ivorian judiciary's weakness and inability to prosecute such crimes was itself a means of bolstering its capacity to effectively control the territory by neutralising Gbagbo and, in the longer term, prosecute such crimes domestically. Reflecting his desperation and perception that an ICC investigation could neutralise his rival, Ouattara reportedly called his lawyer, stating "If nothing is done, Gbagbo will kill us! He won't hesitate!"[598] Further, on 7 April 2011, Ouattara declared that all measures will be taken to allow for "exemplary collaboration with international jurisdictions and human rights organisations, in order to investigate, prosecute, and severely punish" perpetrators of "indescribable" acts.[599] Again on 3 May 2011, in his second Article 12(3) declaration, Ouattara reiterated his country's commitment to full cooperation with the OTP, this time narrowing the suggested time period of the ICC's investigation to begin in November 2010, likely seeking to speed up investigations and arrest warrants through a narrower temporal scope.[600]

In parallel, the Prosecutor also took measures to facilitate the opening of ICC investigations. According to leaked e-mail communications, between December 2010 to April 2011, internal ICC documents discussed ways to trigger the ICC's jurisdiction.[601] For several reasons, the ICC Prosecutor sought a state referral as this would the most feasible and advantageous trigger mechanism. First, as opposed to cases of state referrals, opening

[595] Interview with former member of the French Ministry of Foreign Affairs Laurent Bigot, Paris, 25 May 2016.
[596] Interview with former Ambassador Jean-Marc Simon, Paris, 25 May 2016.
[597] "In this case, the inability of Ivorian judicial system to conduct proceedings fully justifies the intervention of the Court pursuant to article 17 of the Statute." Côte d'Ivoire Counsel on Human Rights Situation in Côte d'Ivoire, para 19-32
[598] Notin 2013, 296.
[599] France24 2011.
[600] Letter confirming acceptance of jurisdiction of 3 May 2011. Another reason for the narrower time period could be to reduce the likelihood of investigations of alleged crimes committed by the Forces Nouvelles armed group during their control over the northern half of the country between 2002 and 2010.
[601] Pigeaud 2017.

investigations based on *proprio motu* requires authorisation from the Pre-Trial Chamber.[602] Beyond judicial thresholds, state referrals also indicate likely cooperation by the referring government, meaning the anticipated success rate of investigations and prosecutions is reasonably higher. State referrals also placate fears that the ICC tramples on state sovereignty and allows the ICC to portray itself as a useful partner in the broader struggle against enemies of the 'international community.' Moreover, a third-party state referral or a UN Security Council referral would avoid the potential legal hurdles stemming from Ouattara's contested legal status at the time of his first Article 12(3) declaration. More specifically, had the ICC Prosecutor requested the opening of investigations via his *proprio motu* powers, this would be based on Côte d'Ivoire's Article 12(3) declaration issued in December 2010.[603] However, Ouattara's status as head of state could be questioned as he had not been constitutionally recognised.[604]

As a result, the ICC Prosecutor sought to open investigations via third-party state referrals, likely a State Party from West Africa. On 21 December 2010, the Prosecutor explained, "I think African states play a critical role in this, to find a solution to the problem. But if no solution can be found and crimes are committed, African states could be willing to refer the case to my Office and also provide forces to arrest those individuals who commit the crimes in Côte d'Ivoire."[605] On 5 April 2011, he stated his office was "discussing with some (ICC) state parties, particularly within the region, if they wish to refer the case. That would help to expedite the activities of the court."[606] On 11 April 2011, in a leaked email, the ICC Prosecutor's advisor also expressed the Prosecutor's hope that a state from the region would refer the situation in Côte d'Ivoire to the ICC as soon as possible.[607] These states likely included

[602] Article 15(3) and (4) of the Rome Statute. Indeed, the Prosecutor does not need to ask the Pre-Trial Chamber for authorisation to open an investigation based on state referrals or a UN Security Council referral.
[603] While the Article 12(3) declaration issued by then President Gbagbo in 2003 accepted ICC jurisdiction "for an unspecified period of time," the application of this declaration to events that occurred over seven years later could easily be subject to debate. In addition, the ICC Prosecutor had found that declaration somewhat unusual, as Gbagbo's government had sent the letter via fax, though without any type of follow-up typical of diplomatic communication. Interview with former ICC Prosecutor Luis Moreno-Ocampo, Oxford, 12 May 2018.
[604] Laurent Gbagbo's defence counsel at the ICC later unsuccessfully raised this issue to challenge the ICC's jurisdiction. Côte d'Ivoire Observations on Admissibility of Laurent Gbagbo.
[605] Office of the Prosecutor 2010d.
[606] Krancj 2011.
[607] Pigeaud 2017.

Senegal, Burkina Faso, or Nigeria, all ICC States Parties and sympathetic to Ouattara. In doing so, the Prosecutor followed the rationale for state referrals that drafters of the Rome Statute expected would be higher than self-referrals, namely that a State Party would bring a complaint against another State Party. This would have been the first such referral in the ICC's history.[608] However, no state decided to issue such a referral.

Third, even though an investigation had not yet materialised by early April 2011, the measures taken by Ouattara, France, and the ICC Prosecutor indicate that the plan was to end the crisis by arresting Gbagbo and transferring him to the ICC. Indeed, the convergence of political interests between the Ouattara administration, France, and the ICC Prosecutor around potential investigations against Gbagbo and his entourage was particularly evident at the end of the crisis. On 11 April 2011, Laurent Gbagbo and approximately 100 members of his entourage were arrested by the FRCI with assistance from French troops. While Ouattara stated that day that he would ask the Minister of Justice to initiate a judicial procedure against Laurent Gbagbo, his wife, and his collaborators, the Ouattara administration expected the Gbagbo couple would be tried at the ICC, while other members of his entourage would be tried nationally.[609] For instance, in the lead-up to the arrest, a leading member of the pro-Ouattara forces indicated that they had no intention of killing Gbagbo, "but rather wanted him to stand trial at the ICC, following the example of former president Charles Taylor of Liberia."[610] Also, on the day of Gbagbo's arrest, speaking to the UN Security Council, the Ivorian representative to the UN stated that, after a swift and professional arrest, Gbagbo was "in good health" and would be tried.[611] On the same day, the Ivorian Ambassador to France alluded to international prosecution and the advantages of such a legalistic strategy. "We must not in any way make a royal gift to Laurent Gbagbo in making him a martyr. He must be alive and he must answer for the crimes against humanity that he committed."[612] The reference to crimes against humanity, which did not appear in the Ivorian criminal code prior to the implementation of the Rome Statute in January 2015, indicates the hope that Gbagbo would be tried at the ICC. Moreover, one week after Gbagbo's arrest, Côte d'Ivoire's Ambassador to the UN highlighted the

[608] In September 2018, the first third-party state referral occurred. Argentina, Canada, Chile, Colombia, Paraguay, and Peru officially referred Venezuela to the ICC Prosecutor.
[609] AFP 2011b.
[610] The Guardian 2011.
[611] AFP 2011a.
[612] Rice and Watt 2011.

expectation that Gbagbo would be tried at the ICC. "[Gbagbo] has too much crime on his hands. He will definitely face the International Criminal Court."[613]

In parallel, the ICC Prosecutor indicated a particular interest in investigating Laurent Gbagbo. According to leaked email communications, on the same day as Gbagbo's arrest, an advisor to the ICC Prosecutor called the Africa director at the French Ministry of Foreign Affairs and indicated the Prosecutor's hope that Ouattara would not release Gbagbo from detention. The advisor also stated, "Ocampo will try to contact Ouattara or one of his advisors."[614] The Prosecutor's request for Ouattara to maintain Gbagbo in detention, despite investigators having not yet travelled to Côte d'Ivoire, the absence of an official investigation, and the absence of any sealed or unsealed arrest warrant against him highlight at the very least a strong degree of anticipation that the ICC would focus on Gbagbo in some significant capacity, likely as an accused.

Finally, while some argue that coordination between Ouattara, France, and the ICC Prosecutor amounted to a plot against Gbagbo,[615] the anticipation of a trial as a way to neutralise Gbagbo actually served, to some extent, to help keep Gbagbo and his entourage alive. While scholars find varying strength of the ICC's deterrent effect,[616] a question that is beyond this study's scope, the plan to try Gbagbo had deterrent effects on the pro-Ouattara forces at the time of his arrest. Indeed, in order to ensure the success of this legalist decapitation of his rival, Ouattara ordered his forces to capture Gbagbo and his entourage unharmed. This was also a requirement set by the French officials. According to Admiral Edouard Guillaud, in exchange for facilitating the FRCI's access to the presidential residence by securing the aptly-named Boulevard de France, France required the FRCI to promise "that it would not end in a bloodbath"[617] as Sarkozy did not "want any trouble for France if this situation ends up at the International Criminal Court."[618] According to French Ambassador Simon, Ouattara promised the FRCI would not commit "any reprisal, any abuses" and ordered his troops that "Gbagbo and his entourage must not be harmed."[619] Ouattara personally called the commanders who led the final operation, "even those with the most unclean hands," to communicate these

[613] Africa Renewal 2011.
[614] Pigeaud 2017.
[615] Pigeaud 2017.
[616] Akhavan 2011; Simmons and Jo 2016; Appel 2018.
[617] Notin 2013, 369.
[618] Notin 2013, 325.
[619] Simon 2016, 328.

instructions personally.[620] According to a French diplomat at the time, there were strong reasons to fear abusive conduct by the pro-Ouattara forces. "There was real hatred between the two camps." He recalled how a high-level official in Ouattara's government claimed he would have killed his rivals, if it had been up to him. "That was their state of mind."[621] According to an FRCI soldier, "some of us wanted to finish him off immediately."[622] According to one FRCI commander, Gbagbo surrendered and pleaded for them not to kill him.[623] Other members of his entourage, including Simone Gbagbo, his son Michel Gbagbo, and Secretary-General Désiré Tagro, who ultimately succumbed to his injuries, were reportedly mistreated, "only narrowly avoiding being lynched."[624] As one observer put it, even if defeat is never beautiful, Gbagbo was spared from suffering a very ugly demise.[625]

Conclusion

After nearly six months of hostilities and abuses, President Ouattara's constitutional inauguration ceremony took place on 6 May 2011, and "finally gave him the legitimacy that had been refused to him during the post-electoral crisis."[626] In this context of contested government legitimacy and high uncertainty, the anti-impunity norm was deployed strategically by the Ouattara administration and key international actors to bolster his legitimacy vis-à-vis Gbagbo, using it to reinforce Ouattara's reputation as a supporter of the norms of the international community as well as to bolster his ability to gain effective control over the territory. Reflecting the pragmatism in the norm's deployment, while Ouattara invoked the anti-impunity norm to favour a particular narrative that villainized and delegitimated Gbagbo based on past, present, and future human rights abuses committed by his forces, Gbagbo's high political value and strong spoiler power meant that this villainization did not

[620] Remy 2011.
[621] Interview with former member of the French Ministry of Foreign Affairs Laurent Bigot, Paris, 25 May 2016, Paris.
[622] Khady Sé 2011.
[623] RFI 2011.
[624] Boisbouvier 2011.
[625] Remy 2011.
[626] Bouquet 2011, 171. In an absurdist scene, the inauguration ceremony was presided by none other than Paul Yao N'Dré, the same president of the Constitutional Council who had declared Gbagbo's victory in December 2010. Yao N'Dré said, "We have all been inspired by the devil." Simon 2016, 330.

block extensive diplomatic negotiations with him. Also in light of Gbagbo's high political value and strong spoiler power, despite the ICC's jurisdiction over Côte d'Ivoire and the consensus against amnesties for grave crimes, the threats of prosecution were combined with offers of general amnesty - even after the commission of acts that became charges of crimes against humanity against Gbagbo and Blé Goudé at the ICC. Finally, once Gbagbo's perceived political value decreased, supporting accountability measures, including through close coordination between the government and the ICC, helped justify the motive and means of neutralising Gbagbo, both through force and through law.

Chapter 5: Post-Crisis Stabilisation in Côte d'Ivoire (2011-2018)

Introduction

Following the dramatic culmination of the post-electoral crisis, a UN official captured the uncertainty that reigned. "It's difficult to know exactly what the plan of the government is. Was it just that they wanted Gbagbo taken away? If they stop at Gbagbo, they will have no credibility, and it will be a failure."[627] Yet, over the next few years, Côte d'Ivoire became hailed as a rare success story in post-conflict transition, evidenced by the impressive average GDP growth rate of 7-8%[628] and the country's first-ever peaceful presidential elections held in 2015.[629] According to Ambassador Simon, speaking in 2016, "reconciliation has largely succeeded."[630] However, many Ivorians claim the stability is an illusion and that the country is instead sitting on a volcano. As the spokesperson for the truth commission noted, the calm does not mean there is peace.[631]

This chapter explores how the Ouattara administration's use of the anti-impunity norm contributed to this 'peace-ish' condition. More specifically, the way in which the crisis ended, through the arrest of the former president by former rebel commanders and his later transfer to The Hague, set the foundations for the challenges of stabilising Côte d'Ivoire. Indeed, the Ouattara administration faced the classic challenges of 'victor's peace': it sought to simultaneously manage relations *between* the government and the 'coalition of losers' as well as *within* the 'coalition of victors.' In other words, it sought to promote political reconciliation with supporters of the former regime as well as consolidate control over the entire country by relying on the former rebel-turned-military commanders.

As is common for post-crisis governments that gained power through military means, "chief among the issues that confronted President Ouattara was the question of legitimacy."[632] According to Straus, success in restoring the government's legitimacy depended in part on how

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[627] Corey-Boulet 2011.
[628] The World Bank 2018.
[629] Grant 2015. This is also clear in statements by France and other members of the UN Security Council as they unanimously adopted Res. 2284 (2016). UN Doc. S/PV.7681 2016
[630] Interview with former Ambassador Jean-Marc Simon, Paris, 25 May 2016.
[631] Interview with Séry Bailly, Spokesperson of the Dialogue, Truth and Reconciliation Commission, Abidjan, 17 November 2015.
[632] Straus 2014, 181.

the state managed the justice and reconciliation process.[633] Indeed, in light of abuses committed by all sides, Ouattara's reputation as a highly contested leader was based, and judged, in part on his commitment to the pursuit of impartial justice. In the wake of the crisis, it was already clear that the tension between Ouattara's commitment to upholding impartial justice and his debt towards the pro-Ouattara forces, who carried him to power yet left in their path many allegations of abuse, would be one of the most sensitive issues moving forward. Also, in light of continued insecurity, Ouattara faced various challenges in establishing effective control over the country.

As argued below, capitalising on the anti-impunity norm's enforcement features and functions was used as a resource by the Ouattara administration to further certain short-term political objectives, in a broader effort to boost the legitimation of its administration. The normative imperative that all perpetrators of grave abuses be held accountable served as a discursive axis around which Ouattara administration and its opposition expressed their reputation as thus legitimate political interlocutors as supporters of the norms of the international community. In parallel, pursuing accountability highly selectively helped the administration regain effective control over the country. By exploiting the state's centrality in the enforcement of criminal justice nationally and by the ICC, the Ouattara administration implemented a combination of measures that both supported and undermined the government's responsibility to hold perpetrators accountable. Doing so served as means of coercive leverage and selective neutralisation, thereby helping the government regulate relations with the losers' coalition and within the victors' coalition. Overall, the chapter illustrates how national authorities pursued justice for grave abuses strategically with the aim of boosting its reputation and its ability to exercise effective control over the territory, thereby shaping the balance of power in order to further its stabilisation objectives.

Villainizing / Privileging Political Interlocutors

Following the crisis, even though cases of victor's peace make it even more problematic and challenging, reconciliation became a central part of the Ouattara administration's rhetoric.[636] In light of the abuses committed by all forces, and in light of his political proximity

[633] Straus 2012.
[636] Piccolino 2018, 14.

with the former rebel commanders who were allegedly responsible for grave abuses, Ouattara's commitment to the impartial pursuit of justice became a discursive axis around which both Ouattara and the Gbagbo-affiliated opposition crafted their reputations as legitimate political interlocutors. Ouattara indeed had an interest in reinforcing his legitimacy in the eyes of the international community and in the eyes of the Ivorian population in light of the reputational damage caused by the FRCI's abuses. According to Clark, "Ouattara will have to answer as why he could not rein his forces in much more heavily."[637] The revelation of the "carnage" at the massacre in Duékoué "considerably tainted the image of the FRCI, underlining that the Gbagbo camp does not hold the monopoly over human rights abuses."[638] For one UN official, the abuses "risk[ed] delegitimizing him."[639]

Furthering his previous commitment to the anti-impunity norm during the crisis, and as evidence of his legitimacy as president, Ouattara consistently reiterated his commitment that his government would ensure that all perpetrators of abuses be held criminally accountable through impartial justice. As a researcher for Human Rights Watch notes, "Ouattara has said the right things. He is not shying away from the need for accountability, for reconciliation and investigations."[640] Similarly, according to a diplomat, the Ivorian authorities "are very aware of the perception of Côte d'Ivoire internationally. They are self-motivated to appear that they are making progress."[641] For instance, on 12 May 2011, in a speech for the Day of the Martyrs of the crisis, Ouattara declared that no crime would go unpunished.[642] Among the first decisions taken as President, Ouattara established an impressive array of anti-impunity measures. In May 2011, Ouattara invited an International Commission of Inquiry, established by Resolution 16/25 of the Human Rights Council, to investigate wrongdoings by all conflict parties.[643] In July 2011, a National Commission of Inquiry was established. In its final report, the Commission concluded that grave abuses were carried out by forces loyal to both sides, finding that pro-Gbagbo forces were responsible for 1,452 deaths and the FRCI were responsible for 727 deaths.[644] In June 2011, a Special Investigative Cell was established, mandated to lead investigations and prosecutions of crimes committed since 4 December 2010,

[637] The Guardian 2011.
[638] Hofnung 2011, 167.
[639] The Guardian 2011.
[640] Africa Research Bulletin 2011.
[641] Interview with diplomat, Abidjan, 4 November 2015.
[642] RFI 2011.
[643] Human Rights Council 2011b.
[644] Commission Nationale d'Enquête 2012.

and was renewed for an indefinite period in 2013.[645] Regarding the ICC, on 3 May 2011, the Ouattara administration issued a second re-confirmation of Article 12(3) declaration, requesting the ICC to conduct impartial and independent investigations throughout the country. In February 2013, Côte d'Ivoire ratified the Rome Statute. After the ICC Pre-Trial Chamber authorised the Prosecutor to open an investigation *proprio motu* in September 2011, Côte d'Ivoire cooperated with enforcing the ICC arrest warrants for Laurent Gbagbo and Charles Blé Goudé. Though Côte d'Ivoire declined to transfer Simone Gbagbo, she was prosecuted in national courts for similar charges.

Nevertheless, the targets of such accountability remain entirely lopsided after more than seven years since the crisis. While many members of the pro-Gbagbo opposition have been charged and tried for various crimes, no member of the pro-Ouattara side has officially been tried. While the leniency of Ouattara's administration towards the former rebels and the pursuit of one-sided justice "risked alienating another group of actors whose support had been key in 2010-2011 – the international community,"[646] international diplomatic pressure on Ouattara regarding equitable accountability was rather limited.[647] This is supported by interviews with the diplomatic community in Abidjan. According to one diplomat, the majority of diplomatic representatives have since 2014 claimed that the crisis was over and that energy should be focused on economic development. Lobbying around justice issues is "less visible, less pressing."[648] As an Ambassador put it, "Victor's justice does not mean that it is not justice…Who are we to tell the Ivorians to speed up their judicial proceedings?"[649] According to another diplomat, "We don't take positions on how domestic mechanisms should work. The [country] does not have a policy of how transitional justice should be done – no 'one size fits all' approach."[650]

At the same time, the reputational liability of the victor's justice was much more salient in the eyes of many Ivorians, as an axis around which to challenge Ouattara's legitimacy as a supporter of international human rights norms. In light of Ouattara's expressed commitment to impartial justice, the way in which criminal accountability was pursued became a platform for the significant proportion of Ivorians who rejected Ouattara's electoral victory, and especially

[645] Côte d'Ivoire Ministerial Order Creating the Special Investigative Cell.
[646] Piccolino 2018, 10.
[647] Charbonneau 2013, 127.
[648] Interview with a diplomat, Abidjan, 1 December 2015.
[649] Interview with an ambassador, Abidjan, 30 November 2015.
[650] Interview with a diplomat, Abidjan, 4 November 2015.

the hard-line opposition, to challenge Ouattara's legitimacy and justify their refusal to participate as political interlocutors in the normalisation of relations between both sides. Indeed, by setting "a common standard for assessing the behaviour of all involved" and thereby generating increased scrutiny of how justice is pursued, the anti-impunity norm's invocation amplified the opposition's contestation of the Ouattara administration's legitimacy.[651] More specifically, the Gbagbo-affiliated opposition promoted a discourse of resistance and used accusations of victor's justice as a salient discursive tactic, focusing on Gbagbo's arrest and transfer to The Hague as the means by which an illegitimate ruler gained power. In other words, Ouattara's decision to arrest Gbagbo prompted criticism of his illegitimacy as a political actor, as they argue that it served to enforce his illegitimate electoral victory. According to the spokesperson of the hard-line faction of the FPI, "Ouattara is illegitimate - he does not have the consent of the citizens!"[652] In this sense, calls by pro-Gbagbo supporters for Gbagbo's release from the ICC are grounded in a principle of democracy. As one pro-Gbagbo supporter explains, "the combat for the liberation of Laurent Gbagbo is a combat for the return of democracy."[653] Denouncing the two-tiered justice, the FPI refused to participate in legislative elections of December 2011 as well as the municipal and regional elections in April 2013 as long as Gbagbo and the FPI cadres were in detention.

Beyond serving as an axis around which the opposition criticised Ouattara's legitimacy, the issue of justice became an axis around which the opposition itself splintered. While the cleavage between the hard-line and moderate factions of the FPI had long been simmering, it was exacerbated by their differing views in how to respond to the detention of Laurent Gbagbo: either accepting or refusing to become a political interlocutor. The hard-line faction, led to Aboudramane Sangaré, refused to participate in politics until Gbagbo was released and instead confirmed Gbagbo as their candidate for the 2015 presidential elections. In contrast to their 'empty chair politics,' Pascal Affi N'Guessan called for engaging in politics as a means by which to lobby the government for Gbagbo's release. This decision prompted the hard-line faction to brand Affi N'Guessan a traitor to Gbagbo and rejected the legitimacy of the Affi N'Guessan-led FPI. According to Laurent Akoun, representative and spokesperson of the hard-line faction, "Careful! There are not two FPI's. The FPI is not in Affi's hands. Affi is an ally

[651] Hurrell 2001, 332.
[652] Interview with Laurent Akoun, Abidjan, 9 December 2015.
[653] Jones 2017, 44.

of Ouattara."[654] Along similar lines, a government official in charge of the political dialogue between the administration and the opposition, explained that the FPI was fully represented by Affi N'Guessan, who participated in official dialogue with the government, and deemed the hard-line faction as spoilers to the political dialogue. "If we wanted to listen to them, we'd be at a deadlock."[655]

The domestic audience costs generated by Ouattara's commitment to the anti-impunity norm was particularly salient during the 2015 presidential campaign, as all opposition candidates demanded the release of Gbagbo from the ICC, a clearly unrealistic and maximalist demand that nevertheless served as a particularly powerful anti-Ouattara platform. Most of the opposition candidates disingenuously promised that they can ensure the return of their leader, repeating this commitment on a daily basis during the campaign. For instance, independent candidate Kouadio Konan Bertin stated, "As soon as I am elected, the next day, I will jump in a plane to free Gbagbo." Pascal Affi N'Guessan, the FPI candidate, stated that freeing Gbagbo is the "only thing at stake in the elections…As Côte d'Ivoire's Head of State, I will have the political, diplomatic and institutional means to ensure that president Laurent Gbagbo and Charles Blé Goudé are freed."

Exploring how the idea of justice served as an axis around which actors shaped their reputations as political interlocutors shows how the idea of justice can be a discursive resource of resistance against the rulers, who may use it as an instrument of power.[656] While Ouattara expressed commitment to the anti-impunity norm rhetorically and through the creation of anti-impunity measures as a means to craft his reputation, the way in which Ouattara administration implemented justice served as an axis around which the opposition criticised his legitimacy as a human-rights supporting leader and justified their decision to become, or refuse to become, political interlocutors.

[654] Interview with Laurent Akoun, Abidjan, 9 December 2015.
[655] Interview with Chief of Staff to a Minister of State, Abidjan, 27 November 2015.
[656] Rabinow 1984, 6.

Coercive Leverage

Towards the Opposition

While Gbagbo's arrest and transfer to the ICC neutralised him as a spoiler, this simultaneously complicated political stabilisation efforts as it prompted the opposition to boycott politics and left the Ouattara administration without a political opposition. In light of this missing crucial element, the Ouattara administration arguably exploited state centrality in the national administration of justice to favour the emergence of a moderate opposition. A government official leading the political dialogue with the opposition explained the high political value of the moderate opposition in the administration's eyes. "One cannot be one's own mirror. The opponent is there to tell you if you're walking straight or not." The official continued, "Absolute power absolutely corrupts."[657] Following the FPI's boycott of the 2012 and 2013 legislative elections, the need for an opposition grew steadily with the run-up to the presidential elections scheduled in October 2015. As such, the way in which individuals were held accountable was used as a means of coercive leverage for Ouattara's government in order to help regulate inter-party relations, between the government and the political opposition.

This was particularly evident in the mass trial of the Gbagbo-affiliated opposition. Following the arrest of Gbagbo and 100 members of his entourage in April 2011, the detained were individually charged for various crimes, ranging from crimes against the state, economic crimes, and 'blood crimes' including genocide. The first trial for any of these charges was held in early 2015, in which 81 members of the pro-Gbagbo opposition were tried for crimes against the state. The initial charges against all accused were threatening national security, plotting against the state, creating armed militias, directing or participating in an insurrectional movement, public disorder, tribalism and xenophobia, coalition of functionaries, rebellion, and usurpation of public function.[658] The defendants included former First Lady Simone Gbagbo, First Vice-President of the FPI and leader of the FPI's 'hard-line' faction Aboudramane Sangaré, and the leader of the FPI's 'moderate' faction Pascal Affi N'Guessan. On 10 March

[657] Interview with a Chief of Staff to a Minister of State, Abidjan, 27 November 2015.
[658] The original charges were 'atteinte à la défense nationale, attentat ou complot contre l'autorité de l'Etat, constitution de bandes armées, direction ou participation à un mouvement insurrectionnel, trouble à l'ordre public, tribalisme et xénophobie, coalition de fonctionnaires, rébellion, et usurpation de fonction.'

2015, 18 defendants were acquitted while the rest were convicted of a selection of the initial charges and handed down sentences ranging from 18 months suspended sentence to 20 years' imprisonment.

For the government, this trial showed its commitment to ensuring justice for victims. For instance, the ruling party's spokesperson stated, "this verdict confirms that Côte d'Ivoire is resolutely on the road of the struggle against impunity."[659] Also, the state prosecutor declared that the verdict is "fair" and shows that "the reign of impunity is finished."[660] However, the range in sentences arguably reflected the government's strategy of generating a moderate political opposition, by exploiting existing divisions within the FPI between the moderate and hard-line factions. Most clearly, the sentences handed down on 10 March 2015 were shorter for the more moderate members and longer for the more hard-line members of the opposition, mirroring the division within the FPI between those who called for engaging in politics to lobby for Gbagbo's release and those who called for boycotting politics until Gbagbo was released from the ICC.

Most notably, on the 'hard-line' side, Simone Gbagbo was convicted for conspiracy against the state, participation in an insurrectional movement, and disturbing public order, and sentenced to 20 years' imprisonment.[661] Unusually, this was twice as long as the sentence requested by the prosecution. Equally, Commander of the Republic Guard General Dogbo Blé and Commander of the National Marine Vice-Admiral Faussignau Vagba were sentenced to 20 years' imprisonment. Also, Laurent Gbagbo's son Michel Gbagbo, a university professor of Criminology who played no official political role in the FPI, was sentenced to five years' imprisonment. Aboudramane Sangaré received five years' imprisonment, though the prosecutor had requested only fourteen months.

In contrast, key leaders representing the moderate opposition received more lenient sentences. Most notably, Pascal Affi N'Guessan was sentenced to 18 months' imprisonment, which he had already served in pre-trial detention. By the time of the trial, Affi N'Guessan, who had already been conditionally released in August 2013, had already taken back the reins of the FPI since his release. Having won the legal right to represent the FPI, he had started participating in a direct dialogue with the government. This short sentence enabled him to

[659] Abidjan Net 2015.
[660] Chalbon-Fioriti 2015.
[661] These charges are '*attentat ou complot contre l'autorité de l'état, participation à un mouvement insurrectionnel, and troubles à l'ordre public.'*

continue leading the FPI. Also, Gbagbo's former Minister of Foreign Affairs Alcide Djédjé and Gbagbo's former Prime Minister Gilbert Marie Aké N'Gbo received suspended sentences of two years. As close allies of Affi N'Guessan, both rejoined the FPI and engaged in political dialogue with the government. Djédjé later rejoined the Ministry of Foreign Affairs in a high-level position.[662] The comparatively lenient sentences swiftly enabled the moderate opposition to reintegrate political landscape of Côte d'Ivoire as an opposition party – a necessary part of Côte d'Ivoire's political stabilisation – while also exacerbating the split in the FPI's ranks.

The range in sentences is not inherently problematic, as different members of the opposition played distinct roles during the crisis and may have been responsible for different types of criminal conduct. Indeed, the government argued the trial displayed its commitment to justice. Yet, the way in which the Minister of Justice Gnénéma Coulibaly defended the trial further raised concerns regarding fair trial standards. The Minister presented two curious lines of reasoning. First, he noted that proving these specific charges is not difficult since it is clear that the accused were guilty of participating in insurrection against the state. "For those who remember what happened in Côte d'Ivoire, it is not necessary to search everywhere for evidence or illustrative elements for the charges."[663] Second, he oddly recalled that the Ivorian justice system had not tried these crimes since 1963, implying that the magistrates did not have the experience expected of them. He used the French expression for "practice makes perfect."[664]

However, the disparity in treatment and the range in sentences strongly appears strategic in light of the trial's serious shortcomings and due process concerns, suggesting the exploitation of the executive's privileged influence over the judiciary. Indeed, widespread criticism of the trial focused on various weaknesses. Most importantly, the judges handed down longer sentences than requested by the prosecution. In addition, the prosecution dropped

[662] Interview with Alcide Djédjé, Abidjan, 4 November and 2 December 2015.
[663] "On s'attendait à des témoignages, à des preuves, alors qu'en fait les infractions visées d'atteinte à la sûreté de l'Etat, de mouvements insurrectionnels ou de bandes armées, sont clairement définies par notre code pénal. Et pour qui se souvient de ce qui s'est passé en Côte d'Ivoire, il n'est point besoin d'aller chercher à mille lieues des preuves ou des éléments illustratifs des faits qui étaient reprochés." Vignon 2015.
[664] "Et les derniers procès dans cette matière en Côte d'Ivoire remontent à 1963. Les magistrats qui avaient présidé et qui avaient organisé ces audiences sont pour la plupart soit à la Cour suprême soit à la retraite, nous avons organisé ces assises après presque dix-huit ans d'interruption. Il va sans dire que c'est à force de forger qu'on devient bon forgeron." Vignon 2015.

charges against the defendants, witnesses testified on the basis of hearsay, and the prosecution did not present solid evidence. Both the UN and human rights groups criticised the proceedings as little more than a sham trial. The UN High Commissioner for Human Rights Zeid Ra'ad Al Hussein noted the trial "laid bare structural deficiencies in the judicial system in Côte d'Ivoire that need to be urgently addressed."[665] According to a leader of a human rights group, "It is as if there was pressure on the judges to proceed swiftly. It is unfortunate – we should have put all the efforts towards the 'blood crimes' investigations to satisfy the victims of both sides, since only the State is concerned here."[666] Human rights groups claimed the trial was "riddled with fair trial concerns"[667] and should be seen as a counter-example for any future trial.[668] According to an unnamed source with privileged knowledge of the case, "We had a lot of evidence but it was not included in the file and very few witnesses were heard during the investigation."[669] According to a diplomat, "the Simone Gbagbo trial bothers everyone."[670] Even Affi N'Guessan, who benefitted from the disparity in sentences, criticised the political nature of the sentences. "The sentences were distributed based on the person, not based on facts but based on their attitude vis-à-vis the ruling power."[671] In light of these shortcomings in the quality of the proceedings, it is highly like that political interference played a role in the trial's outcome.

At the same time, the exploitation of the executive power's centrality in the norm's enforcement at the national level in order to regulate power relations helped further the administration's goals of promoting a policy of détente with the moderate opposition, crucial for democratic governance and the presidential election scheduled seven months later. This moderate opposition did not become a political threat to the Ouattara administration during the elections. The election results show how the vast majority of the FPI electorate abstained from voting, displaying support for the FPI's Sangaré faction. Indeed, the turn-out for the 2015 presidential elections was 52% (down from 81.12% in 2010), with only 9% of the electorate voting from Affi N'Guessan. In this sense, the Ouattara administration's approach succeeded: setting the parameters of accountability to exacerbate existing cleavages further divided and

[665] OHCHR 2015.
[666] Grisot 2015.
[667] HRW 2016.
[668] FIDH 2015; LIDHO, OIDH, MIDH 2015.
[669] Grisot 2015.
[670] Interview with diplomat, Abidjan, 1 December 2015.
[671] Duhem 2015.

weakened the Gbagbo camp while nevertheless maintaining some form of moderate and benign political opposition.

Towards the Former ComZones

In parallel, the combined threat of justice and the promise of impunity also served as coercive leverage to help regulate intra-party power relations, between the government and the security services, in order to optimise the government's ability to exercise effective control over the territory, especially in light of continuing security threats. The mounting pressure on the Ouattara administration to pursue even-handed justice zeroed in on potential criminal responsibility of several key players, namely the all-powerful former zone commanders of the *Forces Nouvelles* rebellion, known as the 'ComZones,' who became the pillars of Ouattara's state security apparatus.[672] Based on the national and international commissions of inquiry, as well as the Special Investigative Cell, the government held much information regarding their alleged criminal responsibility.[673] The pursuit of criminal accountability was thus one means by which Ouattara could reduce their influence, making these FRCI leaders fear "that the Ouattara government may try to purge them from the army, or that they may end up in front of the ICC for crimes committed during the armed struggle against the Gbagbo regime."[674] At the same time, in a potential source of instability for Ouattara, many of these individuals felt they had not been compensated enough and demanded 'their due' from the government. As the relationship between Ouattara and these commanders was one of mutual dependence and wariness, the central question for Ouattara was how far he would "be capable (or not) of freeing himself from the soldiers 'who made him king.'"[675] According to the spokesperson of the

[672] The ComZones who controlled the ten zones in rebel-held northern Côte d'Ivoire are Morou Ouattara, Hervé Touré, Chérif Ousmane, Zoumana Ouattara, Koné Zacharia, Issiaka Ouattara (Wattao), Losséni Fofana, Daouda Doumbia, Traoré Dramane, Ousmane Coulibaly, Gaoussou Koné, and Martin Kouakou Fofié.
[673] Confidential Interview with researcher from a human rights organisation; Interview with senior official in an international organisation, Abidjan, 11 December 2015; Interview with senior official of the Human Rights Division – UNOCI, Abidjan, 12 December 2015. Amnesty International 2011, 35.
[674] Martin 2018, 10.
[675] Banégas 2011, 466. Leboeuf further notes that since 2011, the Ivorian authorities hesitate between relying on them to control the army and marginalising them when they begin to gain too much importance or independence. Leboeuf 2017, 258.

Commission on Dialogue, Truth, and Reconciliation, Ouattara faced the challenge of sawing off the branch he was sitting on.[676] Similarly, a senior UN official stated, "the government initially wanted to cut the branches of the ComZones…but these branches go deep, and the question is how to reduce their influence without threatening the security of the state."[677]

In light of the ComZones' extremely high perceived political value to the Ouattara administration's ability to exercise control over the territory and their high potential to spoil the relative stability, Ouattara arguably used the promise of impunity as a chip, and the threat of accountability as pressure, within the domestic processes of bargaining with them. Offering protections from criminal accountability in exchange for their loyalty, while nevertheless maintaining the Damocles' sword of justice over them, helped regulate the particularly delicate relationship between the Presidency and the security forces – though ultimately to the detriment of the impartial and independent pursuit of justice.[678] This was achieved by exploiting the executive's influence over the judiciary to set limits on the pursuit of justice nationally, while nevertheless leaving prosecution as a possibility.

Before analysing how the scope of criminal accountability was strategically set, it is important to underline the ComZones' high political value and high spoiler power, or how the ComZones are both a crucial pillar and a serious threat to national security. Rather than a clear break from the dynamics prior to 2010, during which time the ComZones controlled the economic and military structures of the northern half of Côte d'Ivoire, the post-crisis dynamics were marked by the ComZones' continued influence not only over the territory each commander used to control but also over the "broad array of informal tax and revenue-generating networks, as well as local dispute resolution and service provision roles" despite their integration into the army. This helped them maintain the loyalty of hundreds of armed elements, control over large quantities of unaccounted weapons and ammunition, and the support of northern communities, enabling them to "resist unwanted military reforms by threatening to turn that power against the government."[679] For instance, in 2015, one former ComZone was found to possess an arsenal of weapons and ammunition that could outmatch

[676] Interview with Séry Bailly, Abidjan, 17 November 2015.
[677] Martin 2018, 11.
[678] Using justice as a means of coercive leverage formed one part of a broader bargaining approach with the ComZones, including promotions, bonuses, transfers, and demotions. Leboeuf 2017.
[679] Martin 2018, 11.

the firepower of the entire army.[680] The mutinies in January 2017 also illustrate the military's continuing leverage and the limits of the efforts to weaken these links through the integration of former *Forces Nouvelles* combatants.[681] As one French officer explained, "Whether we like it or not, without these guys, it would be anarchy in the country."[682] Further, and importantly, some of the ComZones are loyal to their former leader, Prime Minister Guillaume Soro, rather than to President Ouattara. This creates the possibility that Soro may leverage his support with the ComZones and their former soldiers to challenge Ouattara.[683] Their military influence, combined with their general loyalty to Soro rather than Ouattara, thus makes them a political wildcard for the Presidency.

Created in June 2011, the Special Investigative Cell is the main judicial unit in charge of investigating and prosecuting crisis-related crimes. Its creation was welcomed by human rights organisations as a "first step to fight impunity" as it responded to the need to address these inherently complex investigations through a special unit completely devoted to fact-finding and establishing responsibility.[684] As of August 2018, the Cell has issued charges against 150 individuals for 'blood crimes,' including crimes against humanity and genocide, against military and civilian officials from both sides. However, none of these officials have faced trial nationally. While the Cell had high potential for pursuing impartial justice, the Cell's margin of manoeuvre was arguably crafted through explicit and implicit influence of the executive branch in a way that ensured it would not prosecute politically valuable commanders and derail the government's efforts to control the country, while nevertheless enabling it to continue investigations - thereby formally upholding the President's professed commitment to the anti-impunity norm and in parallel maintaining it as a means of leverage over key power-holders.

This can be seen first by exploring the parameters of the independence of the Special Cell. The independence of magistrates and investigating judges is in theory protected from the vagaries of political will in several ways. The formal separation of powers, and the independence of the judiciary, is officially enshrined in the Ivorian constitution of 23 July

[680] Bavier 2015a, 6.
[681] To placate the demands of thousands of former rebels who had been integrated into the army, each received around $8,000 after swift negotiations facilitated by several ComZones. Aboa and Bavier 2017.
[682] Hofnung 2012.
[683] Piccolino 2018, 13.
[684] FIDH, AMDH, LIDHO 2013, 14.

2000.[685] Also, while the magistrates are under the authority of the Minister of Justice, who reports to the President, the independence of their decision-making is enshrined in the code of penal procedure and the constitution.[686] To be clear, while the Minister of Justice gives instructions to the Procureur de la République, who then transfers the casefile to the examining magistrates, the magistrates are formally independent and can conduct the investigative procedures and make recommendations for prosecution based on their independent assessment of the case. Nevertheless, the hierarchical link to the executive power can clearly be a factor in their decision-making regarding politically sensitive cases.[687] Also, magistrates are in principle immovable and their assignments should not be subject to political considerations.[688] This is somewhat limited, however, by the President's role as head of the Superior Council of the Magistrature (*Conseil Superieur de la Magistrature)*, which makes decisions regarding the appointment, reassignment, and promotion of members of the judiciary.

In light of the political sensitivity of these particular cases, these formal protections of judicial independence do not fully thwart obstacles to the independence of members of the Special Cell. One obstacle stems the Cell's proximity to the Ministry of Justice. According to a former member of the Cell, "The Special Cell was created by a decree from the Minister of Justice. In theory, the Minister does not manage the investigating judges. That is in theory. Between theory and practice, that is where it happens."[689] Tellingly, Gnéném a Coulibaly was appointed Minister of Justice in 2012, a post he held until early 2016. He is a close ally of the highly influential and former rebellion leader Guillaume Soro, who was Prime Minister and Minister of Defence, and later President of the National Assembly. According to a human rights researcher, "He was Soro's last Minister. His unofficial mandate was to do everything to avoid any accountability for the former ComZones."[690] In this sense, while the members of the Special Cell are independent, the political proximity between the Minister of Justice and Soro, and by extension the former ComZones, is a disincentive for judges who seek to investigate the ComZones.

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[685] Constitution of Côte d'Ivoire 2000, Article 101-103.
[686] Law on Status of Magistrates, Article 7; Ivorian Code of Penal Procedure, Article 33; Constitution of Côte d'Ivoire 2000, Article 103.
[687] ICTJ 2016, 23.
[688] Constitution of Côte d'Ivoire 2000, Article 103; Law on Status of the Magistrates, Article 6.
[689] Interview with former member of the Special Cell, 12 September 2017.
[690] Interview with researcher from a human rights organisation, Abidjan, 2 November 2015.

More concretely, while the immovability of judges is constitutionally protected, the threat of being transferred is a means by which members of the Cell were indirectly disincentivised from pursuing politically sensitive cases.[691] Commenting on the independence of the judiciary in Côte d'Ivoire, one former member of the Cell noted, "It is official, but it is not totally effective. There are many obstacles to overcome. We need to have the courage to say it: when you are too independent, you bother. You are transferred. The transfers are a way for the government to sanction investigating judges who bothered." So, "for those who do not want to be transferred, they are inclined to work in a manner that pleases those who are in charge of transfers. At the end of each judicial year, they ask themselves, will I be transferred?"[692] An example of how this practical limit on the independence of judicial actors can serve as a clear disincentive was the case of investigating judge Losséni Cissé, who issued the first indictment of a member of the pro-Ouattara forces, Amadé Ouérémi. After being charged with crimes ranging from murder to endangering state security, Ouérémi was arrested in May 2013. His arrest was politically problematic, as Ouérémi had fought alongside influential individuals, including two former ComZones, Losséni Fofana and Ousmane Coulibaly, during the southern offensive in March 2011. His testimony is thus politically inconvenient and a liability for these politically valuable individuals, as Ouérémi explained how he received weapons and instructions from Coulibaly and Fofana during the hostilities in Duékoué, during which several hundred people were killed.[693] This may explain his continued detention without trial five years after his arrest.[694] Cissé, the judge who signed the indictment, was transferred several months later from Abidjan to Bouaké, located over 300 km away. This type of decision around human resources negatively impacted the Cell's work more broadly, as the majority of the Cell's staff were reassigned and replaced a few months later.

A more implicit, though also entirely clear, way in which judicial actors were disincentivised from prosecuting high-value individuals was through the appointment of former ComZones to key leadership roles, despite their alleged responsibility for human rights abuses. As then Minister of Defense commented, in light of their crucial role in enforcing

[691] Constitution of Côte d'Ivoire 2000, Article 103. Neither the 2013 presidential decree renewing the Special Cell nor the 2014 decree on the nomination of members of the Cell includes the immovability of magistrates who are part of the Cell. Decree Creating the Special Investigative and Examination Cell; Decree Nominating Members of the Special Cell.
[692] Interview with former member of the Special Cell, 12 September 2017.
[693] FIDH, MIDH, and LIDHO 2014b, 19.
[694] There is no limit to the number of times the four-month limit for pre-trial detention can be renewed. Ivorian Code of Penal Procedure.

stability, "[t]he solution was to make them leaders."[695] For instance, former ComZone Chérif Ousmane was accused of abuses committed as he took control of key neighbourhoods in Abidjan, including ordering the summary executions of 29 prisoners in early May 2011.[696] In August 2011, he was promoted to second-in-command of the presidential security guard (*Groupe de sécurite de la présidence de la République*, GSPR). Also, former ComZone Losséni Fofana led the western offensive around Duékoué, where the massacre took place in March 2011.[697] In August 2011, Fofana was first promoted to vice-commander of the army's newly-created Special Forces and later became the FRCI commander for the volatile western region. Former ComZone Ousmane Coulibaly was in charge of securing the pro-Gbagbo neighbourhood of Yopougon, during which time soldiers under his command allegedly "committed dozens of summary executions and frequent acts of torture during the final battle for Abidjan."[698] In September 2012, Coulibaly was appointed prefect for San Pedro, strategically located for the exportation of cocoa (the country's top export) and the scene of frequent insecurity.[699] Moreover, following the munities in 2017, eight ComZones were promoted to lead military units.[700]

Their appointments are a clear signal to disincentivise judicial actors from investigating them, as their omnipotence renders the pursuit of accountability incredibly challenging. According to an official of an international organisation who is very familiar with the dynamics within the military apparatus, "some FRCI leaders are not able to sanction" the former ComZones. For example, former ComZone Koné Zacharia has been accused of detaining civilians extra-judicially, but "he does what he wants. He is above the law." In this sense, it is contradictory to mandate a judge to lead investigations against these individuals while simultaneously promoting the potential accused. "It is a bit hypocritical."[701] Diplomatic sources expressed concern that even prosecuting rank-and-file soldiers or low-level commanders from the FRCI could threaten security due to the "precarious control President

[695] Bavier 2015a.
[696] HRW 2011.
[697] Denying accusations, Fofana stated, "We were not responsible for the Duékoué massacres. There, each community had its army. Communities were settling scores but we put an end to this." ICG 2014, 22.
[698] HRW 2011.
[699] UN Doc. S/2012/964 2011, para 17.
[700] Leboeuf 2017, 261.
[701] Interview with official, international organisation, Abidjan, 15 December 2015.

Ouattara still exerts over the military."[702] As one government cabinet member acknowledged in 2016, "I am not sure that the government trusts the ex-comzones…but we can't reject them," much less prosecute them.[703] According to an ambassador in Côte d'Ivoire, "the famous question of the ComZones, who certainly committed crimes against humanity… [Ouattara] cannot prosecute them – it would be the end of his presidency."[704]

While their appointments to key posts reveal the limits of Ouattara's professed commitment to the pursuit of impartial justice, the existence of the Special Investigative Cell as well as Ouattara's commitment to cooperate with the ICC simultaneously created leverage for the Ouattara administration over the military. This was evident in the political wrangling over the existence of the Special Investigative Cell. As previously mentioned, the Cell was originally created by ministerial order on 24 June 2011 for a one-year renewable mandate, making its renewal dependent on political support. This became an issue at the end of its second term, as its renewal revealed the tension between the President and the Minister of Justice. Arguing that Côte d'Ivoire's judicial system had recovered and could handle the crisis-era crimes, the newly appointed Minister of Justice Gnénéma Coulibaly intended to close the cell - before any trial had taken place. According to a civil servant in the justice sector with first-hand knowledge of these developments, "At the end of 2012, with the appointment of the new Minister of Justice, his preoccupation was to close the Special Cell. That was his objective."[705] The Cell had started working on pro-Ouattara cases, meaning "clearly the political will decreased. The question became how to close the Cell and transfer the cases to ordinary jurisdictions."[706]

After intense lobbying by civil society, the UN, and the diplomatic community, the Cell was renewed – this time by presidential rather than ministerial decree.[707] Not only was it renewed, it was strengthened in several ways.[708] The presidential decree made the Cell permanent, rather than dependent on political will for renewal, and tied its budget to the general governmental budget rather than to the Ministry of Justice's budget, thereby allowing for greater financial flexibility. Further, its jurisdiction was expanded to include all crimes related

[702] HRW 2013, 29.
[703] Martin 20181, 11.
[704] Interview with an ambassador, Abidjan, 30 November 2015.
[705] Interview with a civil servant in the justice sector, Abidjan, 7 December 2015.
[706] Interview with researcher from a human rights organisation, Abidjan, 2 November 2015.
[707] Interview with senior official in an international organisation, Abidjan, 11 December 2015.
[708] Decree Creating the Special Investigative and Examination Cell.

to the post-electoral crisis of 2010 as well as any infractions connected to these crimes.[709] Human rights groups welcomed the renewal as "an excellent signal of political will for the struggle against impunity."[710] According to a human rights researcher who partook in the lobbying, "Ultimately, Ouattara's willingness to do justice is rather clear. He always repeats it to interlocutors. He says it in private, he says it in public. His engagement for justice is not in doubt, it's the agenda and timing that is subject to negotiation."[711] This renewal also reflects how the President pursued several objectives at once: maintaining its existence as a sign of his commitment to the pursuit of justice and maintaining it as a means of leverage over the potentially accused power-holders within the military.

While the vast majority of indictments have targeted individuals aligned with the pro-Gbagbo opposition, the continued existence of the Cell nevertheless maintains the Damocles' sword of justice over the heads of influential actors. Most clearly, leaked information revealed in July 2015 that indictments had already been issued against eight pro-Ouattara members of the FRCI, two of whom are high-ranking former ComZones, Chérif Ousmane and Losséni Fofana, for war crimes committed in Abidjan and Duékoué, respectively. Two soldiers under Fofana were equally indicted. While the individuals remain free, indicating a level of protection from prosecution, the indictments were welcomed by human rights groups as a "decisive step in legal procedures" of crisis-related crimes[712] and marked the first time these ComZones were questioned by Ivorian judicial authorities. According to a source close to the investigation, "They are sensitive cases. It is difficult to investigate individuals who are in power."[713] According to a human rights researcher, the investigating judges "are certainly courageous people."[714] In light of the confidentiality of the proceedings, it is difficult to fully debunk suggestions that the leaked indictments were purely perfunctory, though individuals with knowledge of the proceedings indicate the indictments were the result of extensive investigations by the members of the Cell.[715] While these individuals remain free and in

[709] Its name was changed from the Special Investigative Cell (*Cellule Spéciale d'Enquete*) to the Special Examination and Investigative Cell (*Cellule Spéciale d'Enquete et d'Instruction*).
[710] ICTJ 2016, 11.
[711] Interview with researcher from a human rights organisation, Abidjan, 2 November 2015.
[712] Le Monde 2015.
[713] Bazzara 2016.
[714] Phone Interview with researcher from a human rights organisation, 23 October 2015.
[715] Confidential Interview with researcher from a human rights organisation, Abidjan. Interview with former member of the Special Cell, 12 September 2017. In addition, the Cell had issued several summonses for FRCI members in late 2014, though the individuals did not comply with the summons.

influential posts, the political ramifications of these indictments benefit the Ouattara administration. Not only does it defuse criticisms of victor's justice in advance of the presidential elections later that year, the indictments maintain the threat of accountability over the former ComZones. Overall, while the Special Cell's one-sided prosecution record so far reflects a strong degree of political pressure to protect certain individuals and to avoid destabilising Côte d'Ivoire, it nevertheless serves a function of maintaining bargaining leverage over key strongmen who serve as a pillar and a threat to the Presidency.

Selective Neutralisation

While the previous section examined how the exploitation of state centrality within the national administration of justice helped shape power relations in a way that favoured the government's objectives of maintaining stability, this does not mean that charges for grave crimes have not been issued and that trials for human rights abuses have not taken place. The Special Investigative and Examination Cell has charged over 150 people from both Gbagbo and Ouattara sides for 'blood crimes,' including crimes against humanity, war crimes, and genocide. Twenty individuals have been charged for the March 2011 attack on Duékoué, twenty people have been charged for the suppression of protests in Abidjan by Gbagbo's security forces, dozens of individuals from both sides have been charged for attacks in the Abidjan neighbourhood of Yopougon for alleged crimes during the crisis, and eighty individuals have been charged for an attack on a refugee camp in Nahibly in 2012, including self-defence militias and members of the FRCI.[716] However, despite these wide array of charged individuals, the only individuals who have been tried for crimes under international law are those who were targeted by an ICC arrest warrant: Laurent Gbagbo, Charles Blé Goudé, and Simone Gbagbo.

Tracing the inconsistencies within Côte d'Ivoire's decision-making regarding transferring Ivorians to The Hague shows how the state's centrality within the ICC system enables governments to, in full compliance with their duties under the Rome Statute, exploit their margin for manoeuvre to pursue strategic political objectives. Indeed, the primacy of domestic jurisdiction and the ability of states within the ICC's complementarity regime to indicate their (un)willingness to genuinely investigate and prosecute given cases domestically

[716] HRW et al 2018.

enabled authorities to selectively transfer indicted individuals to The Hague based on a cost-benefit analysis of whether trying them nationally or at the ICC would bolster the government's ability to control Côte d'Ivoire in the wake of the crisis. Rather than simply an admissibility test, complementarity was interpreted through the lens of stabilisation and allowed authorities to pursue selective neutralisation of individuals as a function of post-crisis political exigencies. Indeed, the Ivorian government's decision to transfer only two out of three individuals wanted by the ICC is unique in situations before the ICC so far.

Though this preference evolved over time, the Ouattara administration had envisioned a division of labour between Côte d'Ivoire and the ICC since the crisis, proactively keeping open the possibility of transferring Gbagbo and his close associates to The Hague by not launching investigations for Rome Statute crimes. On 1 May 2011, after President Ouattara announced the launch of criminal investigation against Laurent Gbagbo, Simone Gbagbo, and other members of his entourage, the Minister of Justice clarified that these judicial investigations would exclude crimes that may fall under the ICC's jurisdiction.[717] Further, in his letter to the ICC Prosecutor on 3 May 2011, President Ouattara noted that "the Ivorian judiciary is not at this stage in the best position to address the most serious of the crimes" committed since 28 November 2010 and "any attempt at trying the most responsible individuals may face multiple obstacles."[718] The ICC Prosecutor referred to these two latter points in his request for authorisation to open investigations.[719] Within four months, the ICC issued arrest warrants against Laurent Gbagbo, Simone Gbagbo, and Charles Blé Goudé for crimes committed during the post-electoral period between December 2010 and April 2011.

Though Laurent Gbagbo's transfer to the ICC did not raise admissibility issues, since the Ivorian government displayed its unwillingness to prosecute by transferring him, the justifications provided by Ivorian authorities and diplomats highlight how his transfer was not simply deontologically-driven but rather viewed as a means to reduce instability caused by his presence in the country and thereby increase the government's ability to exercise full control over the territory. Indeed, Laurent Gbagbo was deemed of very low political value to the government's strategy of stabilising the country and, maintaining high spoiler power, represented a continued threat to stability, though lower than during the crisis. Aware of the political volatility of his transfer, Ivorian authorities and the ICC kept plans for his arrest and

[717] Abidjan Net 2011b.
[718] Letter to the Prosecutor dated 3 May 2011
[719] OTP Request for Authorisation 2011, 18,19

transfer secret until the last minute. The ICC arrest warrant was issued under seal on 23 November 2011 and unsealed, to the surprise of his lawyers, on 30 November 2011 - the day of his transfer to The Hague. Government officials highlighted several reasons for his transfer. The government spokesperson explained that Gbagbo's transfer was "salutary" because it would ensure there is no impunity (deontological) and it would placate criticisms of bias had Gbagbo been tried nationally and enable the government "to definitively dedicate itself to its purpose: improve the living conditions of Ivorians" (consequentialist).[720] Invoking the consequentialist 'reconciliation through justice' rationale, Minister of Justice Coulibaly stated, "it is difficult to go into a reconciliation process when people who have committed crimes do not accept responsibility."[721] In clear terms, one government official explained, "It makes everyone uncomfortable, but we had no choice at the time. Gbagbo has weight…political force…he has followers. He lost 46% to 53% - the margin is not wide. 7 points."[722]

More interesting is the Ivorian government's contrasting treatment of Charles Blé Goudé and Simone Gbagbo, which highlights inconsistencies in the government's approach to complementarity. The ICC arrest warrant for Blé Goudé was issued under seal on 21 December 2011. After being extradited to Côte d'Ivoire from his hiding in Ghana, Blé Goudé was charged nationally on 21 January 2013 with war crimes as well as murder, kidnapping, and economic crimes committed during the country's post-election crisis. The ICC arrest warrant was unsealed on 20 September 2013. Six months later, on 22 March 2014, Côte d'Ivoire surrendered Blé Goudé to the ICC, where he is currently in the Court's custody, on trial for his alleged role as an indirect co-perpetrator of four counts of crimes against humanity. On parallel tracks, the ICC arrest warrant for Simone Gbagbo was issued under seal on 29 February 2012 and unsealed on 22 November 2012. Côte d'Ivoire then filed an admissibility challenge on 30 September 2013 on the grounds that Simone Gbagbo was being investigated and prosecuted in national courts, referring to the three sets of charges issued against her: economic crimes, crimes against the state, and 'blood crimes' or crimes against individuals that are "of the same nature as those alleged in the case before the Court."[723] Indeed, Simone Gbagbo had been

[720] Asked if the government needed to distance Gbagbo, Koné replied, "Our goal was not to distance Laurent Gbagbo. Our ambition was to make Côte d'Ivoire a state of law and to ensure that there is no impunity. There is no better answer than this transfer." RFI 2011.
[721] AFP 2011.
[722] Interview with a Chief of Staff to a Minister of State, Abidjan, 27 November 2015.
[723] Côte d'Ivoire Challenge to Admissibility of Simone Gbagbo

charged with human rights violations, including genocide, by national courts.[724] On 11 December 2014, ICC Pre-Trial Chamber I rejected the admissibility challenge.[725] After Côte d'Ivoire appealed the decision, the Appeals Chamber rejected the challenge and confirmed the case's admissibility on 27 May 2015, stating that the investigative steps in Côte d'Ivoire were "scarce in quantity and lacking in progression."[726] On 10 March 2015, Simone Gbagbo was convicted in Ivorian courts for crimes against state security. Simone Gbagbo was later tried for crimes against humanity and war crimes and was acquitted on 28 March 2017.

The timing and the arguments put forward in the admissibility challenges highlight a degree of inconsistency in Côte d'Ivoire's position. In the admissibility challenge filed on 30 September 2013, Côte d'Ivoire argued that it had opened investigations at the national level for similar charges and substantially the same conduct. Regarding the "inability" criterion, Côte d'Ivoire argued that it was able to try the case nationally as the judicial infrastructure had substantially improved since the crisis, national courts had reopened throughout the country, and a National Commission of Inquiry and a special investigative unit were created.[727] Yet, Côte d'Ivoire did not contest the admissibility of the case against Blé Goudé and surrendered Blé Goudé to the court six months later in March 2014. This distinction highlights how the complementarity regime enables a government to claim it is simultaneously willing and able to prosecute certain accused while unwilling and unable to prosecute others, even though the defendants are accused of similar charges. By extension, it shows how governments can interpret complementarity based on a cost-benefit analysis of whether national prosecutions would help or harm stabilisation objectives. The contrast in treatment is due to the perception that, for reasons explained below, trying Blé Goudé nationally was a costly risk to stability while trying Simone Gbagbo was less costly and presented advantages for the government's objectives.

[724] The International Commission of Inquiry stated that conduct during the crisis may amount to crimes against humanity but did not mention genocide. Simone Gbagbo was charged with genocide in February 2012.
[725] Simone Gbagbo Admissibility Decision.
[726] Judgment on Appeal against Admissibility of Simone Gbagbo.
[727] In addition, with regards to the "(un)willingness" criterion, Côte d'Ivoire argued that the domestic proceedings were not undertaken with the purpose of shielding Simone Gbagbo from her criminal responsibility. Côte d'Ivoire Challenge to Admissibility of Simone Gbagbo, paras. 35-38, 43-44, and 52-54.

Regarding Blé Goudé, Ivorian authorities intended at first to try him nationally, in line with Ouattara's commitment that only Laurent Gbagbo would be transferred to the ICC.[728] Yet, the perception that Blé Goudé was a security threat and maintained high spoiler power, evident from interviews with governmental, UN, and diplomatic sources, eventually convinced the Ouattara administration to agree to transfer him to The Hague. According to the UN Group of Experts, Blé Goudé had reportedly "been involved in financing the military and political network that planned and carried out several important attacks" in 2012 and "attempts by those individuals to destabilise the new administration of Côte d'Ivoire cannot be ruled out."[729] Explaining why Blé Goudé was kept in an undisclosed location, Minister of the Interior Hamed Bakayoko noted, "Given the context and the personality [of the accused], we cannot take any risk and maintain the greatest degree of secrecy."[730] Referring to his ability to mobilise supporters, a senior official within an international organisation noted, "When he went to court hearings in Abidjan, there were large crowds at the tribunal."[731] Explaining why the government transferred both Gbagbo and his right-hand man, French Ambassador Simon explained, "the ICC was a relief for the government. It would have been too complicated to manage the trials in Côte d'Ivoire."[732] More broadly, a senior official in the Ministry of Justice explained, "There was really a political dimension. One has to consider the consequentialist and deontological rationales. Should you apply the law because it is the law and it should be applied or in relation to the consequences? My mission, and the mission of the government is: the greatest good for society [corps social] is peace. If justice could create trouble…." He continued, "In 2012 and 2013, when the ICC requested the transfer of Blé Goudé, we had the human resources (our magistrates are among the best trained)" but complications could arise because Blé Goudé "is not an anonymous person. He is known, even very well-known. If Blé Goudé were to be tried here, would it guarantee social peace? During the period preceding his transfer, anti-riot security teams had to be sent to the Court. For peace, and quietude, we transferred him."[733]

[728] Ben Yahmed 2013.
[729] UN Doc. S/2012/766 2012, para 30 ; UN Doc. S/2012/196 2012, para 20.
[730] Ben Yahmed 2013.
[731] Interview with a senior official with an international organisation, Abidjan, 11 December 2015.
[732] Interview with former Ambassador Jean-Marc Simon, Paris, 25 May 2016.
[733] Interview with senior official in the Ministry of Justice, Abidjan, 1 December 2015.

In contrast, trying Simone Gbagbo domestically was deemed less costly and even advantageous in regulating both intra- and inter-party relations. In terms of a cost-benefit analysis, some officials highlight that transferring a woman to the ICC would negatively impact the government's reputation, in light of a cultural view regarding the treatment of women. According to an official from the Ministry of Justice, "It's immoral to deport a woman. There is always a grain of sympathy for a woman, even if we portray her as a murderer."[734] However true this may be, there is also a more strategic angle to the government's decision. Importantly, Simone Gbagbo had much lower spoiler power as she had a relatively weaker ability to mobilise supporters than the other two accused. "Simone Gbagbo is not Laurent Gbagbo. Even if she is an Iron Lady, she was never a great mobiliser, because the society is strongly patriarchal. She doesn't mobilise many people, like a man would."[735] Her appearances at her trials in Abidjan drew many people, but the crowds were entirely manageable and did not provoke security incidents.

Yet, she was deemed politically value for several reasons. For instance, refusing to transfer her sets a precedent for refusing to transfer any future indictees. This helps signal to key power-holders within the military, namely former ComZones, that the Ouattara administration will not send them to The Hague. Indeed, the Ivorian government's attitude towards the ICC changed around the time Prosecutor Bensouda stated on 31 March 2015 that the ICC investigations into the pro-Ouattara side would intensify.[736] Just two weeks later, in April 2015, President Ouattara declared that he would not send any more Ivorians to The Hague, possibly anticipating further arrest warrants following the OTP's investigations into the pro-Ouattara side.[737] Ouattara's refusal to transfer Simone Gbagbo increases the credibility of this promise. This shows how the government can exploit the state's centrality within the Rome Statute system, namely the ICC's dependence on state cooperation and states' jurisdictional primacy, to quell the apprehension of those who rightly fear the Damocles' sword of the ICC but who are also valuable to Côte d'Ivoire's stability.

Equally, by maintaining Simone Gbagbo in Côte d'Ivoire and trying her in national courts, the government retained the possibility of using her as a pawn in the political chess

[734] "C'est malsain de déporter une femme. Il y a toujours un brin de sympathie pour la femme, même si on la présente comme meurtrière."
[735] "Elle ne mobilise pas plus que quelqu'un d'autres, comme un homme." Interview with senior official in the Ministry of Justice, Abidjan, 1 December 2015.
[736] France24 2015.
[737] JeuneAfrique 2015a.

game of reconciliation with the Gbagbo opposition. Maintaining her in the country kept open the potential for granting pardons and clemency as a source of leverage, measures that the government frequently mentions as available options which grew increasingly attractive in light of the 2020 presidential elections. As explained by Michel Gbagbo, point-person for issues of political prisoners for the Sangaré-affiliated opposition, as well as a government official leading the political dialogue with the Affi N'Guessan-affiliated opposition, the issue of political prisoners (though the government rejects this term) is a central bone of contention in the political dialogue between the government and the FPI.[738] According to Simone Gbagbo's lawyer, Ouattara regularly mentioned he would consider issuing a clemency or a pardon. Ouattara eventually did so over three years later in August 2018, granting amnesty to approximately 800 people, including Simone Gbagbo.[739] This continued Ouattara's practice since 2011 of offering clemency to thousands of prisoners, including to those whom opposition groups note are 'political prisoners,' amidst efforts towards national reconciliation.[740]

At the same time, national proceedings against Simone Gbagbo were opened in direct response to the ICC's case against her. As part of efforts to challenge the case's admissibility at the ICC, Simone Gbagbo was tried individually for war crimes and crimes against humanity in national courts and acquitted in March 2017. In this sense, the trial appears to fulfil the goal of the complementarity regime: encouraging national prosecutions for international crimes. However, serious concerns with regards to fair trial standards prompted the civil parties to reluctantly pull out of the trial. Ivorian and international human rights organisations, including those who had participated as civil parties throughout the investigation, described the trial as a "judicial fiasco"[741] that "did little to advance the cause of justice."[742] The concerns regarding the "genuineness" of the proceedings may become an issue in future admissibility proceedings in line with Article 17(2). However, this is beyond the scope of this thesis.

Overall, this shows how the state's centrality in the Rome Statute system enables a government to pursue full compliance with its duties under the Rome Statute while also

[738] Interview with Michel Gbagbo, Abidjan, 5 November 2015; Interview with Chief of Staff to a Minister of State, Abidjan, 27 November 2015.
[739] Interview with Simone Gbagbo's lawyer Rodrigue Ange Dadjé, Abidjan, 13 November 2015.
[740] For instance, in January 2016, Ouattara offered clemency to 3,100 prisoners held since the post-electoral crisis as part of his call for "all my fellow citizens to seize this new opportunity towards a national gathering and the consolidation of peace." France24 2016.
[741] Konan 2018.
[742] HRW 2017.

accommodating the political exigencies of post-crisis stabilisation. The practice of states' outsourcing of cases of politically problematic individuals to the ICC simultaneously undermines one version of the anti-impunity norm, that states must hold individuals accountable for abuses domestically, while fulfilling another version of the norm, that states must cooperate with legal proceedings in international courts but do not need to hold individuals accountable in domestic courts. Tracing the decision-making of Ivorian authorities reveals how the vagueness within the norm itself enables states to strategically deploy one of the two versions of the anti-impunity norm depending on perceived interests of doing so.

Conclusion

By adopting measures that both supported and undermined the imperative for states to hold individuals accountable for grave abuses, Ivorian authorities furthered its short-term objectives by neutralising some threats while maintaining alliances with others. The way in which accountability was pursued served as coercive leverage to encourage the emergence of a moderate opposition to replace the hard-line opposition. In parallel, selectively neutralising some alleged perpetrators that were no longer politically valuable, and were indeed a threat to the government's objectives, by transferring them to the ICC, while sheltering high-value individuals from prosecution helped the government reach its objective of increasing its effective control over the country and preserve stability. This was achieved through the exploitation of the norm's enforcement features and functions to favour short-term entrenchment of government power. Yet, it did so by undermining the Ouattara administration's commitment to fully uphold the anti-impunity norm. By exacerbating deeply-held grievances within Gbagbo's constituencies over perceived injustices and lack of representation, this pragmatism prevented the Ouattara administration from pursuing justice as a long-term transformative project.

Chapter 6: The Maelstrom in Mali (2012-2013)

Introduction

Sparked in January 2012, a conflagration of crises violently debunked the widespread view that Mali was a stable democracy in a turbulent region. Within several months, Mali simultaneously experienced a constitutional crisis, a separatist rebellion, and an occupation by various terrorist groups of nearly two-thirds of the country. The Malian state was described as facing an unprecedented "near-death experience" and being at the brink of "sheer dissolution," in which its very existence and secular nature were at stake.[743] In the midst of this maelstrom, Malian authorities issued a self-referral to the ICC in July 2012 and repeatedly insisted on the importance of pursuing criminal accountability for crimes under international law. As two members of a Malian armed group known as Ansar Dine were later charged with war crimes and crimes against humanity by the International Criminal Court, it is crucial to analyse how actors' usage, or deployment, of the anti-impunity norm shaped the political dynamics during the crisis.

This chapter first provides background information on the crisis and presents the chapter's central argument. It then analyses how actors used the anti-impunity norm's functions in furthering short-term objectives and traces how the state's relative centrality within the enforcement of justice shaped how the norm was implemented. The chapter focuses primarily on the measures taken by the Malian authorities, but also highlights measures taken by the Algeria, France, the AU, and the UN - as these actors were deply involved in the negotiations. Similarly to the Côte d'Ivoire situation, tracing the norm's exploitation shows how the anti-impunity norm was not a rule that supplanted and constrained politics but rather a flexible resource that contributed to shaping the political dynamics of the conflict on terms favoured by the Malian transitional authorities, supported by key international actors. This chapter then leads to Chapter 7, which explores the usage of the anti-impunity norm over the five subsequent years.

[743] Chivvis 2016, 149; ICG 2012a, 1; Bergamaschi with Diawara 2014, 145; Mann 2012.

Background

Many years in the making, a multidimensional crisis was triggered in early 2012 and set off what became Mali's *annus horribilis*. Following the fall of the Qaddafi regime in Libya, approximately 1,000 Malian-born Tuaregs who had been fighting in Libya returned to northern Mali with weapons, supplies, and training and gave new momentum to a secessionist feeling among some Tuaregs. In October 2011, they formed the Movement for the National Liberation of Azawad (*Mouvement national de libération de l'Azawad*, MNLA) and launched an armed rebellion, claiming the state of "Azawad" which broadly encompassed the three northern regions (Timbuktu, Gao, and Kidal). During hostilities in January 2012 between the MNLA and the Malian army at Aguelhok, around 100 soldiers were killed after surrendering, with their hands tied behind the back and their throats slit. This prompted fury against President Amadou Toumani Touré's government in Bamako as it revealed the government's inadequate provision of equipment and support to the army's operations in the north.

Amidst this anger, a few dozen soldiers led by Captain Amadou Haya Sanogo, led a coup d'état against President Touré on 22 March 2012, just a few weeks before scheduled presidential elections. The coup was condemned internationally. The African Union and ECOWAS suspended Mali, neighbouring states imposed sanctions, and other states declared their refusal to formally cooperate Sanogo's unconstitutional government. Under intense pressure, Sanogo agreed to hand power to a civilian transitional government on 6 April 2012. However, highlighting friction within the army, a particularly emblematic case of human rights abuses occurred on 31 March – 1 April 2012, when an attempted counter-coup by an elite army unit that had remained loyal to former President Touré commonly called the "Red Berets," was violently put down by Sanogo's coup leaders, who allegedly disappeared, tortured, and killed 21 Red Berets soldiers.

Within three weeks of the coup, Bamako lost control of northern Mali to armed groups. The MNLA, a pro-independence and secular Tuareg group, was joined by other groups, including Ansar Dine, a Tuareg Salafist movement with links to al-Qaeda in the Islamic Maghreb (AQIM).[744] Ansar Dine was established in 2012 by Iyad ag Ghaly, a Malian Tuareg leader who has been a key figure in the Malian politico-military landscape for decades and

[744] This group has many transliterations, including Ancar Dine, Ansar al-Din, Ansar Eddine, and Ansar ul-Din. Ansar Dine will be used in this thesis.

recently took a "jihadist turn," perhaps from newfound convictions but also for political expediency.[745] On 26 May 2012 the MNLA and Ansar Dine announced their merger in the "Transitional Council of the Islamic State of Azawad," which was to "apply Islamic legislation in all facets of life, based on the Koran and the Sunna" as well as build a unified army.[746] Unable to conceal growing rifts between the MNLA and Ansar Dine, the merger was short-lived as the MNLA quickly renounced its commitment to the agreement one week later.

In addition, AQIM and its offshoot Movement for Unity and Jihad in West Africa (MUJAO), a Salafist splinter group made up of Saharan fighters, also took advantage of the insecurity triggered by the MNLA's rebellion and gradually fanned out across northern Mali, adding a radical dimension to the armed conflict. Ansar Dine, working in alliance with AQIM and MUJAO outgunned and side-lined the MNLA. Starting in June 2012, they began exercising nearly exclusive control over two-thirds of Mali, a territory roughly equivalent to the size of France, with no local adversaries to contend with, making it "one of the world's better-established terrorist safe havens."[747] During this "jihadist occupation," a harsh version of sharia law was implemented, banning drinking, smoking, television, music, football…, which was enforced by lashings, amputations, and other forms of corporal punishment. In what became emblematic of this occupation, militants destroyed mosques and mausoleums in Timbuktu.

This crisis was marked by contestation over the legitimacy of the Malian authorities as members of the international community as well as contestation over who were the 'legitimate' opposition groups. Regarding the government, the interim civilian government led by President Dioncounda Traoré and Prime Minister Cheikh Modibo Diarra was formally legitimate and recognised as such by the UN, ECOWAS, and the AU, as former President of the National Assembly Traoré had been sworn in as Interim President, as required by the 1992 Constitution, following the Sanogo-led coup against former President Amadou Toumani Touré. Yet, this transitional government was weak and in need of bolstering and strengthening, not only in terms of its reputation but also in terms of its capacity to effectively control its territory.[748] In parallel, there was contestation over who were the 'legitimate' armed groups with whom the

[745] Chivvis 2016, 63.
[746] Mandraud 2012.
[747] Chivvis 2016, 160.
[748] The two goals of restoring constitutional order and restoring control over the north were repeatedly stated in 29 statements and resolutions by the UN, ECOWAS, and the AU during this period, as well as the 6 April 2012 agreement between civilian leaders and the coup leader Sanogo as well as the government's transitional roadmap published in July 2012.

government should negotiate and who were the 'illegitimate' armed groups who should be militarily neutralised. An associational strategy was adopted towards groups that renounced terrorism while preparations for an African-led military operation against Islamist-terrorist groups developed. More precisely, international actors called for the Malian authorities to negotiate with the 'legitimate' groups, namely MNLA and Ansar Dine, while preparations were hammered out for an African-led armed operation against the 'illegitimate' groups, namely MUJAO and AQIM. This dual pronged-approach appeared in all UN Security Council resolutions adopted in 2012.[749]

While this strategy appeared to be based on broad consensus, seen by how the UN Security Council resolutions on Mali between January 2012 and February 2013 were passed unanimously,[750] unlike other resolutions being discussed at the time concerning Syria and Libya, there was in fact a wide range of views about how to manage the crisis and how to engage with the kaleidoscope of armed groups.[751] Most importantly, the Malian authorities expressed their readiness to negotiate with these groups but displayed little enthusiasm and did not officially participate in any formal negotiations with any group during this period, preferring instead military operations against all groups.[752] Preparations for a military approach were quickly sped up after the groups started a surprising southward advance in early January 2013, crossing of the Rubicon of the Niger River and prompting Malian transitional authorities to request French military intervention. France swiftly launched Operation Serval on 11 January 2013, which successfully yet only temporarily thwarted the groups' advance.

This chapter argues that Malian executive authorities selectively supported and undermined accountability measures in ways that shaped the reputation of actors as members of the international community as well as the power relations between the government and the opposition in order to further short-term political objectives**.** As Mali was portrayed as a new front in the 'global war on terror,' the idea of the 'the terrorist as international criminal' was

[749] For instance, as stated in Resolution 2071 (2012), the Security Council "urges the transitional authorities of Mali, the Malian rebel groups and legitimate representatives of the local population in the north of Mali, to engage, as soon as possible, in a credible negotiation process in order to seek a sustainable political solution, mindful of the sovereignty, unity, and territorial integrity of Mali." UN Doc. S/RES/2071 (2012), para 4.
[750] These include UN SC Resolution 2056 (2012), Resolution 2071 (2012), Resolution 2085 (2012).
[751] ICG 2012a, 28.
[752] The government sent two letters to the UN Security Council, on 18 September 2012 and 18 October 2012, requesting the authorization of an international force.

an axis around which the political reputations of various actors were produced, either privileging them as legitimate political interlocutors or villainizing them as enemies of mankind in the 'war on terror' and thus rejects of the international community. Also, as in Côte d'Ivoire, actors invoked the threat of accountability as means of coercive leverage to shape both inter- and intra-party dynamics and as a guiding thread in justifying the neutralisation of other actors via force and law. Overall, the chapter shows how the anti-impunity norm was used as a salient resource in contributing to boosting the ability for the Malian state to re-establish its international reputation and at least temporary control over the north. Its application formed a productive dimension of the political dynamics of the crisis, by helping actors justify the motive and means of legitimising, rather than problematizing, the Malian state.

Villainizing / Privileging Political Interlocutors

While there was general consensus among Malian authorities and international actors over the threat represented by the consolidation of northern armed groups as a new front in the 'global war on terror,' they disagreed on whether to favour negotiations or military action. As Charbonneau puts it, "central in this is the problematic distinction between parties with whom one can make peace, and parties with whom one 'can only' make war."[753] In other words, who are the groups with whom the government can build peace and who are the groups who must be neutralised? In Mali, the anti-impunity norm's deployment provided a strategic interpretive resource to brand terrorist groups as international criminals - double *hostis humani generis.* Indeed, one of the justifications for international criminal justice is the protection of human diversity and plurality, [754] which was being attacked by groups seeking to impose fundamentalist rule in northern Mali. Thus, the application of the anti-impunity as an interpretive frame in the Malian context contributed to drawing a dichotomy between non-criminal non-terrorist groups as a foil to criminal terrorist groups, the former to be associated with negotiations and the latter to be excluded.

Yet, as this section illustrates, this villainizing effect was not necessarily deployed based simply on alleged criminal conduct of the labelled subject, but rather on their perceived

[753] Charbonneau 2017, 13.
[754] Nouwen and Werner 2015, 159.

political value to resolving the conflict through negotiations. In other words, as Malian and international actors viewed the conflict through different lenses, anti-impunity considerations indeed shaped the reputation of parties as legitimate political interlocutors, but not in a determinative manner. Indeed, key international players, including Burkina Faso, Algeria, France as well as the UN Security Council more generally, drew a distinction between legitimate and illegitimate groups based not on their commission of crimes but rather on the group's expressed support of terrorism. To resist this pressure to negotiate, the Malian authorities capitalised on the anti-impunity norm as a strategic resource to undermine this rival narrative and brand its opposition writ large as threats to human diversity by virtue of their responsibility for grave human rights abuses. In helping build the "architecture of enmity relevant to decision- and policy-making in Mali," the norm was thus used differently by various actors in the politics of identifying terrorists and left "room for manoeuvre afforded to the Malian state and actors to accept, resist, or adapt this conceptualisation of the 'enemy.'"[755] Further, focusing on the 'terrorist as international criminal' helps overshadow a more holistic picture of the crisis which would problematize the Malian state's own responsibility in fomenting the emergence of this instability. Overall, rather than suggesting the threat posed by the various opposition groups was not serious, as it most definitely was, it is nevertheless revealing to show how the norm was used strategically to privilege and villainize political interlocutors and help actors favour a certain narrative over an alternative one.

Government vs. Separatists vs. Terrorists

It is first helpful to note how the different lens adopted by international actors and Malian authorities shaped their approach to who is a legitimate interlocutor. The efforts to respond to the turmoil in Mali over the course of 2012 raise an interesting parallel between counter-terrorism strategies and the use of international criminal law. Both are justified as responding to threats to human diversity – the former through force, the latter through law. Counter-terrorism strategies frame the enemy's fundamentalist ideology as a threat to political, cultural, social, and religious diversity, on both a local and global scale. As Nouwen and Werner explain, crimes against humanity "threaten the very conditions for politics and human action by corrupting the idea that the world is a place to be shared by peoples living in a

[755] Charbonneau 2017, 14.

multitude of cultures, habits, identities…"[756]Drawing on Arendt, they argue that international criminal law thus also aims to protect diversity because it responds to conduct that amounts to "an attack on human diversity as such, that is, upon a characteristic of the 'human status' without which the very words 'mankind' or 'humanity' would be devoid of meaning."[757]

The labelling of certain actors as terrorists and as criminals has similar branding effects, through the depoliticization of the actor. The label 'terrorism' depoliticizes the actor, as "the insurgent is assumed to be rational and political, while the terrorist's rationality and relationship with politics are in perpetual doubt."[758] Equally, no matter the political objectives being pursued or the causes of conflict, the "problematisation of certain acts as international crimes…introduces in parallel a spurious de-politicization process." [759] Thus, applying international criminal law within the 'global war on terror' framing creates a powerful image of the 'terrorist as international criminal,' branding 'terrorist' groups who commit international crimes as enemies of mankind - twice over.

In Mali, while both Malian authorities and key international actors similarly sought to address the threats posed by opposition groups, they diverged in their interpretation of who is a threat to human diversity and thus who is an (il)legitimate interlocutor. For those promoting a counter-terrorism strategy, groups' illegitimacy stems from their aim to destroy the political, cultural, social, and religious diversity in Mali and more globally through fundamentalist Islamist ideology imposed through violent means. As such, 'hard-core' terrorists presented the main threat against diversity, through both their ideology and their criminal acts. Concrete efforts were thus made throughout 2012, led by Algeria and Burkina Faso, to generate a political dialogue between Bamako, the MNLA, who declared its rejection of terrorism and Islamist ideology, and Ansar Dine, who varyingly expressed support for Islamist ideology as well as openness to negotiating with the Malian state. This strategy was aimed at prising these groups away from the more 'hard-core' terrorist groups AQIM and MUJAO, who fully supported Islamist ideology and rejected the authority of the Malian state. This focus deems 'non-terrorists' legitimate interlocutors while overlooking grave abuses that these groups may have committed. Indeed, despite the MNLA and Ansar Dine's clear involvement in alleged

[756] Nouwen and Werner 2015, 159; Luban 2011.
[757] Arendt 1964, 268-269 as cited in Nouwen and Werner 2014, 158.
[758] Charbonneau 2017, 5; Stampnitzky 2013, 49-82.
[759] Turan 2015, 29.

war crimes in northern Mali since January 2012, international actors called for political dialogue with them throughout the year.

This flexibility with regards to the normative prohibition against negotiating with groups accused of international crimes was most clear in the responses to the destruction of Timbuktu mausoleums, which prompted global outrage, including a declaration by the ICC Prosecutor that the acts amounted to war crimes.[760] These measures, taken by Ansar Dine and AQIM, intended to eradicate the religious diversity in Mali, eliminating Sufi shrines and imposing one interpretation of Islam. In the same week as the African Commission on Human and People's Rights condemned the acts "in the strongest possible terms" and declared "such barbaric and unspeakable acts" as "war crimes and crimes against humanity,"[761] the AU stated Ansar Dine can be part of a negotiated political solution if it breaks with AQIM and its allies. The AU Peace and Security Commissioner Ramtane Lamamra explained that the AU ruled out negotiations with "terrorist group" AQIM but regional mediators maintained contacts with the MNLA and Ansar Dine. "We have not yet exhausted all the possibilities to reach a peaceful solution to this situation."[762] Also**,** UN Security Council Resolution 2056, adopted on 5 July 2012, simultaneously condemned "the desecration, damage and destruction of holy, historic and cultural significance" committed in part by Ansar Dine and threatened sanctions against the group, stating that "any acts of terrorism are criminal and unjustifiable, regardless of their motivations, whenever and by whomsoever committed" while also calling "on all groups, including the MNLA, Ansar Dine, and foreign combatants on Malian soil, to renounce all affiliations" from terrorist groups to participate in national dialogue.[763] As late as November 2012, even though French officials were privately unconvinced that the negotiations would succeed, President Hollande called upon President Traoré to "intensify the dialogue" with groups that rejected terrorism, namely MNLA and Ansar Dine.[764] Speaking after the adoption of UN SC Resolution 2085 (2012), the Representative of France to the UN explained on 20 December 2012 that "our hope is that the authorities in Bamako and the northern armed groups that dissociate themselves from terrorism hold a political dialogue that allows for elections to

[760] AlJazeera 2012; UNESCO 2012a; UNESCO 2012b; The Organisation of the Islamic Conference declared that the destroyed monuments were "part of the rich Islamic heritage of Mali and should not be allowed to be destroyed and put in harm's way by bigoted extremist elements." BBC 2012a.
[761] African Commission on Human Rights and People's Rights 2012.
[762] Fletcher 2012.
[763] UN Doc. S/RES/2056 (2012).
[764] Notin 2014, 122.

take place across the entire country and the peaceful return of the Malian army to its garrisons."[765] As late as 21 December 2012, both MNLA and Ansar Dine stated their commitment to finding a negotiated solution.[766]

This flexibility with which actors apply the anti-impunity norm arguably depends on the target's perceived political value to the negotiations. Despite its alliance with AQIM and its alleged responsibility for international crimes, Ansar Dine, especially its leader Iyad Ag Ghaly who is "by far one of the most experienced figures in Mali's political quagmire,"[767] was deemed a particularly valuable player in negotiations. In light of its Malian and Tuareg origins, as opposed to the international profile of AQIM, as well as Ag Ghaly's only recent turn towards Islamist ideology, Ansar Dine was viewed as more likely to come back into the fold of secular Mali. At various points in 2012, Ag Ghaly declared he would not contest the Malian state, that he was open to negotiating with the government, and even sought to reconcile with MNLA. To this end, since the early days of 2012, "Algeria and other countries continued to downplay his jihadist credentials and portray [Iyad Ag Ghaly] as a potentially useful interlocutor in the conflict. Indeed, given his secular past, not a few outside observers questioned the strength of Ghal[y]'s allegiance to jihadism – and the durability of his ties to AQIM."[768] In August and November 2012, Ansar Dine met with Burkina Faso's Minister of Foreign Affairs, while in parallel having consultations in Algeria, who sought to reconcile the MNLA, Ansar Dine and Malian authorities.[769] As late as 21 December 2012, Ansar Dine stated its commitment to finding a negotiated solution.[770] At the same time, occupying a median position "between the jihadis and the West," Ag Ghaly also called for sharia law and maintained collaborative relations with AQIM.[771] Throughout 2012, Ansar Dine maintained a somewhat ambiguous posture vis-à-vis the MNLA, AQIM, Bamako and the international community – pursuing a

[765] Araud 2012c; See also Araud 2012a. « Notre espoir est que les autorités de Bamako et les groupes armés du nord qui se dissocient du terrorisme mènent un dialogue politique qui permette la tenue d'élections dans l'ensemble du pays et le retour pacifique de l'armée malienne dans ses garnisons. »
[766] BBC 2012b.
[767] Lecocq et al 2013, 352.
[768] Chivvis 2016, 63. The Algerians were reportedly surprised by Ag Ghaly's participation in the southern offensive in January 2013, considering this move to be "unforgiveable treason." ICG 2013, 18.
[769] Diallo 2012. ICG 2013, 3.
[770] BBC 2012b.
[771] ICG 2012a, 32.

"kind of ambiguity to place himself in the centre of every possible outcome of the conflict."[772] He has entertained relations with the Malian government – even working at the Malian Presidency and serving as a diplomat to Saudi Arabia – as well as entertaining relations with AQIM after reinventing himself as an Islamist. Later becoming closer to AQIM, he was identified in 2013 as a terrorist leader and placed on the US sanctions list – though he maintained his shadowy links to various terrorist and 'non-terrorist' groups. To illustrate his political value, Walther and Christopoulos use social network analysis to show that Ag Ghaly is a top-scorer in terms of "between-ness centrality," meaning he occupies a central place within the networks of influential figures of various armed groups and thus "incredibly higher brokerage benefits than would be expected by chance."[773]

Overall, various international actors used the anti-impunity norm to both condemn acts perpetrated by groups as war crimes while also painting some of them as nevertheless legitimate interlocutors, as long as they were not the 'hard-line' AQIM or MUJAO. In other words, the political exigencies imposed by the 'global war on terror' frame set the parameters of legitimacy in a particular way: rather than being deemed illegitimate interlocutor based on the perpetration of international crimes, even crimes condemned as shocking and abhorrent, one is deemed illegitimate based on one's expressed support for Islamist terrorism.

Government vs. Separatists and Terrorists

In contrast, contesting this portrait of (il)legitimate political interlocutors, Malian authorities used the anti-impunity norm as an interpretive frame to identify the threat to human diversity as stemming from the perpetration of international crimes, overlooking whether the alleged perpetrators officially support or renounce terrorism. This approach reflected how "the government in Bamako hardly acknowledges a difference between jihadists and Tuareg rebels, arguing that they are more or less the same people."[774] As mentioned above, while Bamako expressed its openness to these negotiations, it did not formally participate in any talks. For Bamako, the only real solution would be military, as it saw a promising opportunity to eliminate

[772] Lecocq et al 2013, 352.
[773] Walther and Christopoulos 2014, 505-508.
[774] Charbonneau 2017, 7; Guichaoua 2017; Interview with member of the French Ministry of Defence, Paris, 25 November 2016.

not only the hard-core 'terrorist' groups but also the 'non-terrorist' separatist Tuaregs, deeming both enemies.[775] In this sense, Malian authorities used the anti-impunity norm to simultaneously transcend the discursive distinction between legitimate and illegitimate groups and conflate all groups as criminal and illegitimate interlocutors, as well as to project the legitimacy of its own embattled government.

This can be seen from the Malian government's decision to self-refer to the ICC. Capitalising on the state's privileged position in the system of international criminal justice, the Malian transitional authorities surprisingly decided to issue a self-referral as one of its first measures taken in the chaos of the coup d'état's aftermath. On 18 July 2012, Minister of Justice Malick Coulibaly signed and delivered the self-referral letter to the ICC Office of the Prosecutor. The intention to project its own legitimacy as a government, while lumping the MNLA, Ansar Dine, MUJAO, and AQIM as perpetrators of crimes under international law and into an undifferentiated criminal enemy, is evident from the government's justifications for this decision as well as the timing of the self-referral.

Explaining why the government took the decision to self-refer in the midst of conflict, Minister Coulibaly highlighted the appropriateness of doing so, in light of the government's commitment to the importance of upholding the international norm of holding individuals accountable for grave crimes and its inability to provide justice due to its displacement from the north. "Given that the north of Mali is not under the control of the legitimate authorities, we think it is *right* to submit the case to the court *in order to avoid impunity*."[776] Also, Prime Minister Diarra's speech to the UN General Assembly in September 2012 shows how he highlighted his government's decision to self-refer to display, at the highest diplomatic pulpit, its membership in the international community as a law-abiding and human rights-promoting government while branding and villainizing its opposition as "lawless" and criminal. Diarra began his speech by saying:

> [C]onflict resolution by peaceful means has taken on a distinctive dimension for my country, Mali, *firmly committed to ideals of peace and stability*, which, nevertheless, faces today one of the most difficult times in its history. Its territory is occupied by armed groups composed of *fundamentalist terrorists, drug traffickers, and other criminals of all types*. The most basic human rights are

[775] Notin 2014, 117; Charbonneau and Sears 2014, 9.
[776] Irish and Lewis 2012 [emphasis added].

> constantly being violated *by a hoard of faithless and lawless vandals*. In light of this, the Malian government recently appealed to the International Criminal Court to investigate these odious acts that are no less than war crimes and crimes against humanity.[777]

Another reason Diarra's government self-referred, knowing full well the extent of the ICC Prosecutor's independence and jurisdiction over the country, was to legitimise his government vis-a-vis past and successive governments. Indeed, following the killing of soldiers in Aguelhok by Tuareg rebels, hundreds of women and children of the soldiers who had been killed vehemently protested the government's secrecy shrouding the attack.[778] This public outrage contributed to grievances against then President Touré's government, ousted in March 2012. Diarra, appointed the month after the coup, sought to legitimate his new government by responding to these demands. For instance, in an interview in July 2012 in front of a large televised audience of Malian political elite, and amidst rumours that he would be removed from his position as Prime Minister, Diarra was asked what the government would do in response to the Aguelhok massacre and sexual violence committed by various groups in Kidal. Diarra answered, "We immediately undertook the formation of the government, the documentation of crimes committed, with help from human rights organisations. And our Minister of Justice, along with a delegation, has just returned from the ICC at the beginning of this week, where we submitted a complaint against all these people who committed these crimes."[779] Asked again in an interview five years later, Diarra also insisted that his government self-referred to the ICC due to his anticipation that future governments would undermine his government's commitment to anti-impunity. This self-referral would, in a sense, lock in his government's commitment to justice. While the following governments did indeed exchange impunity during negotiations with armed groups, as analysed in the following chapter, Diarra's response with the benefit of hindsight shows another way the government used its self-referral to illustrate its commitment to the values of the international community, namely human rights and anti-impunity, and thus boost its reputation as a legitimate government despite its inherent weakness.[780]

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[777] UN Doc. A/67/PV.11 (2012) [emphasis added].
[778] "Wives, mothers, and sisters all demanded to know how many soldiers had died and whether their family members had survived." Wing 2017, 189.
[779] Diarra 2012.
[780] Interview with former Prime Minister Cheikh Modibo Diarra, Paris, 11 September 2017. Without doubting the sincerity of Diarra's responses, it should be noted that his answers may

The timing of the self-referral is also important. While it is commonly assumed that justice in Mali solely targets 'terrorist' crimes, particularly as the two defendants at the ICC are accused of signature 'terrorist' crimes of destroying mausoleums and handing down illegal sentences as part of their role in enforcing harsh version of sharia law, the timing of the self-referral indicates that it was in direct response to crimes attributed to all groups, not just MUJAO and AQIM. While the government officially requested ICC involvement on 18 July 2012, the initial decision to self-refer was taken two months earlier. On 30 May 2012, Prime Minister Cheikh Modibo Diarra's government publically declared its intention to refer crimes committed by the MNLA, AQIM, Ansar Dine and other armed groups in the region of Kidal, Gao, and Timbuktu since the month of January 2012.[781] This announcement came after the Aguelhok massacre in January 2012 and before the highly-mediatized destruction of the emblematic Timbuktu mausoleums by Ansar Dine and AQIM, which took place particularly in June and July 2012, and before the full consolidation of Islamist groups' takeover of all northern regions.

This is also evident in the text of the self-referral letter, which reads: "Grave and massive violations of human rights and international humanitarian law were committed namely in the northern part of the territory: summary executions of soldiers of the Malian army, rapes of women and girls, massacres of civilian populations, child recruitment, torture, widespread pillaging of state and private goods, forced disappearances, destruction of state symbols, buildings, hospitals, tribunals, city halls, schools, the offices of NGO and international aid organisations, the destruction of churches, mausoleums, and mosques."[782] Though it did not identify any of the armed groups, its specific reference to summary executions likely refers to the Aguelhok events (blamed in large part on the MNLA with support from AQIM and Ansar Dine[783]), and its reference to the other crimes refers to MNLA, Ansar Dine, MUJAO, and AQIM. Further, in January 2013, Minister of Justice Malick Coulibaly explained "I personally went to The Hague and formally requested the ICC's involvement. We are already aware of acts that we believe constitute crimes within the court's jurisdiction, such as the attack at

have been shaped by his intention to run as candidate for the presidential elections scheduled in July 2018.

[781] Communiqué of the Council of Ministers of Mali, 30 May 2012.

[782] Mali Self-Referral to the ICC.

[783] To be precise, though Ansar Dine fighters reportedly participated in early military actions with MNLA during the 2012 rebellion, the group officially emerged in March 2012.

Aguelhok, the mass rapes at Gao and Timbuktu, and the destruction of our cultural heritage."[784] Illustrating the salience of Aguelhok abuses in Malian political discourse, impunity for the events was again mentioned in 2017, when the Minister of Justice explained during a visit by ICC Prosecutor Bensouda to Bamako that the crimes of Aguelhok would be investigated and prosecuted, either nationally or at the ICC.[785]

The government's strategic conflation of the MNLA with 'terrorist' groups reflected popular resentment against the MNLA, sometimes seen as more problematic than 'terrorist' groups. As Branch has observed with respect to the Lord's Resistance Army in Uganda, in light of the MNLA's rebellion, the Aguelhok massacre, and the looting, killings, and sexual violence it was accused of perpetrating, painting the MNLA as criminal sought to deny them "the possibility of relevance or of becoming a political force."[786] In addition to holding the MNLA responsible for abuses, many Malians hold the MNLA responsible for triggering the crisis more broadly.[787] While the MNLA's rebellion in January 2012 indeed weakened the already frail Malian army and ushered in the takeover by Ansar Dine, MUJAO, and AQIM, many Malians perceive the army's collapse in the north was not due to the strength of the armed groups but rather due to the betrayal of Tuareg officers who held significant positions in the army and then joined the MNLA "without having raised their grievances through formal channels."[788] Even later in the crisis, Bamako elites "continued to harbour deep scepticism and even downright hostility towards the Tuaregs, many still conflating the jihadist and secular groups."[789] As Chivvis explains, "even as Al Qaida expanded its influence across the north, however, southern political elites, including [former President] ATT, would still see the Tuaregs as the real villains. More often than not, these southern elites regarded Al Qaida's grip on the north as either a secondary or the same issue as the Tuareg revolt."[790] In contrast to the MNLA's intention to gain a Tuareg-controlled independent Azawad, the "*mujahideen's* claims to be engaged in the establishment of an Islamic state in Mali that enforces shari'a law is not premised on the exclusion of any ethnic or racial group from the north." In some instances, this led to "a benign vision of the Salafi tenets of the *mujahideen*," though of course "that vision

[784] Hirsch 2013.
[785] RFI 2017a.
[786] Branch 2007, 191.
[787] Kone 2017, 71. Phone interview with a researcher from an international human rights organisation, 5 April 2018.
[788] Marchal 2013b, 147.
[789] Chivvis 2016, 145.
[790] Chivvis 2016, 64-65; Lecocq et al 2013, 353 ; Marchal 2013a, 498.

proved hard to reconcile with the violent *huddud* punishments and petty harassment they inflicted on ordinary citizens."[791] According to Dijxhoorn, accusations of war crimes against the MNLA was one factor that "diminished the chances of the MNLA's reaching its objective of an independent Azawad state."[792] As Marchal notes, support for French intervention would later wane "when it [became] clear that the former colonial power is avoiding punishing the Tuaregs from the crimes that it is widely felt they committed."[793]

To counter its branding and villainization by the Malian authorities, the MNLA also used the language of international criminal law to portray itself as law-abiding and legitimate and denied responsibility for what it called the unfortunate Aguelhok events in January 2012. For example, on 10 October 2012, Dutch lawyers for the MNLA submitted an 'Action Plan: Respecting the Laws of War' to the UN Security Council stating: "the MNLA is deeply concerned that innocent civilians may have been subjected to attacks and protected monuments may have been destroyed in the course of the current armed conflict in Mali." Furthermore, it affirmed that the "MNLA was determined to ensure that its members respected international humanitarian law and that it would investigate any credible allegation of mass human rights abuses committed by MNLA troops." Also, it expressed the desire for a more expansive ICC investigation, calling for investigations into events that took place since July 2002, rather than since 1 January 2012 – the temporal parameters of the ICC investigation suggested by Malian authorities. The MNLA also stated it would cooperate with the ICC in its preliminary examination and announced it would engage with Geneva Call, an organisation which seeks to boost armed groups' compliance with international humanitarian and human rights law.[794] In a letter dated 12 October 2012, the MNLA's lawyers expressed similar commitments to the ICC Prosecutor, welcoming its preliminary examination, stating that the group will submit evidence to the ICC, and reiterating their concern regarding the destruction of religious or historic monuments – crimes that are attributed only to 'terrorist' groups, namely Ansar Dine and AQIM.[795] In February 2013, the MNLA published another declaration in which it expressed support for the ICC and requested investigations into crimes it alleged were committed by Malian state actors.[796]

[791] Lecocq et al 2013, 353-354.
[792] Dijxhoorn 2017, 175.
[793] Marchal 2013a, 498.
[794] MNLA Letter to ICC Prosecutor and UN Security Council 2012.
[795] MNLA Letter to ICC Prosecutor and UN Security Council 2012.
[796] Acherif 2013.

Beyond requesting ICC intervention to investigate alleged crimes by all armed groups, the Malian government further projected itself as a defender of the diversity of humanity's heritage and as a victim of an international criminal enemy by casting a particular spotlight on the signature jihadist crime of the destruction of the Timbuktu mausoleums. In late May 2012, the same month as its decision to self-refer to the ICC, another one of the first steps taken by Prime Minister Diarra's government was to appeal to UNESCO - hardly a typical response to an invasion and occupation by armed groups. The Malian government and UNESCO agreed upon a range of measures, including finalising Mali's accession to the *1999 Second Protocol to The Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict* and requesting the inscription of the two World Heritage sites of Timbuktu and the Tomb of Askia on the List of World Heritage in Danger. In Diarra's words, "In parallel [to the ICC self-referral], when we witnessed, powerless, the destruction of our heritage, both material and immaterial in Timbuktu, there also we swiftly signed and finalised accords that we had with UNESCO, in order for these crimes to be considered as war crimes and will, how would I say, be subject of prosecutions at the international level."[797] Further, he explained that, "this would generate cooperation and the support of the international community for these imperilled sites."[798]

Appealing to the ICC and UNESCO simultaneously helped deterritorialize the conflict and bridge the geographical space between Mali and Afghanistan, Syria, Iraq, where the international community was powerless in responding to the destruction of other UNESCO World Heritage sites, ranging from the Taliban's destruction of the Buddhas of Bamiyan and ISIS's destruction of Palmyra. In doing so, it branded Ansar Dine, whose members worked with AQIM in destroying the mausoleums, as a double threat to the diversity of humanity, not only through its destruction of religious and cultural diversity in pursuit of fundamentalist ideology but also through the commission of war crimes. Diarra's reasoning reflects Hannah Arendt's conception of crimes against humanity as "being international crimes because they transcend domestic boundaries; and they transcend domestic boundaries because they are an attack on human diversity as such."[799] The commission of 'signature' terrorist crimes, similarly to amputations and stonings, was used as justification to not negotiate with Ansar Dine as it

[797] Diarra 2012. Parenthetically, Diarra had been appointed a Goodwill Ambassador for UNESCO in 1998.
[798] Diarra 2012.
[799] Nouwen and Werner 2015, 158-159.

reflected their illegitimacy as interlocutors. For Prime Minister Diarra, "Ansar Dine? One of their groups just amputated people in Timbuktu. I call that extremists, not separatists. It's not the same."[800] The anti-impunity norm helped frame Ansar Dine as on par with the Taliban and ISIS, and thus an illegitimate interlocutor. In sum, the government and armed groups were reified as legitimate or illegitimate interlocutors through actors' strategic application of considerations of international criminal law.

Overshadowing the Malian State's Role

If invoking the importance of upholding the anti-impunity norm helps shape the narrative by branding interlocutors as (il)legitimate, what does it simultaneously overlook and who benefits from this? In line with Shapiro's comment that "representations of alterity (dangerous Others) reproduce the identities and spaces that give nation-states and nations in general their coherence," this section explores how the government's deployment of the anti-impunity norm obscures a more complex picture.[801]

Some observers argue that the self-referral to the ICC was intended to overshadow abuses committed by Malian soldiers. For De Wilt, the alleged crimes highlighted in Mali's self-referral letter "suggests that the enemy had targeted assets of the state including human resources, property, and state symbols, yet the letter is silent on any atrocities that may have been committed by the governmental forces."[802] This echoes concerns raised by other self-referrals, where the government's centrality in drafting the letter and in highlighting certain crimes overshadows crimes committed by government forces within the same conflict.[803] However, this effect was much less flagrant in the Malian case. By the time of the self-referral in July 2012, the Malian army had not been accused of such widespread abuses within this particular crisis. Further, the first alleged crime cited in the Malian self-referral, namely summary executions of soldiers of the Malian army, likely refers to the Aguelhok massacre, yet it may also apply to the Red Berets case, in which Captain Sanogo's supporters in the

[800] Chatelot 2012.
[801] Shapiro 1997, 31.
[802] Van Der Wilt 2015, 214.
[803] For instance, the self-referral by Uganda raised many criticisms that the governments' intent to target and focus on crimes by the armed groups overshadowed the Ugandan military's responsibility for atrocities. Branch 2007.

military were accused of killing fellow Malian soldiers. Thus, the letter remains ambiguous as to the intended scope of the referral regarding crimes allegedly committed by the Malian military.

More importantly, highlighting the government's commitment to combating impunity and the 'terrorist-criminal' arguably helps overshadow how impunity for Malian officials is a strong source of grievance that contributes to the mobilisation against the state – either in insurgent or 'terrorist' groups. Memories of state-sponsored repression and abuses by the Malian military against Tuaregs since Mali's independence is a key element in the Tuareg political imaginary, dating as far back as the first rebellion in 1962.[804] Indeed, the presence of the state "is often a negative one" in that the army "not only cannot defeat militants but also antagonizes the very people who might benefit from its protection."[805] Impunity of state officials and repression by the Malian army against certain ethnic groups was thus one of the factors that ultimately helped open "the door for various groups to flourish in the north, gaining territory and, in some instances, popular legitimacy."[806]

In Mali as in other countries, Islamist groups Ansar Dine, MUJAO, and AQIM grafted onto local conflicts against the state and exploited these feelings of exclusion and neglect "of poor, isolated groups with grievances that are eking out an existence on the margins."[807] The framing of these armed groups as purely 'criminal' helps the Malian elite and its supporters depoliticize what was to many a project that responded to legitimate grievances of being politically and economically marginalised by Bamako elite. Dubuy notes that their objective was "essentially political" as "these groups aim to undermine the Malian state and to create a terrorist State in order to establish sanctuaries like in Afghanistan."[808] By setting up administrative and judicial structures, these groups provided state-replacement services and were in some ways more likely to respond to the populations demands than the rebel groups and the state.[809] For instance, in Gao, after reportedly being invited by influential members of the local Arab communities, MUJAO distributed millions of West African CFA Francs for Ramadan and maintained the town generator by spending thousands of dollars for fuel.[810]

[804] Chauzal and van Damme 2015, 30-35.
[805] Pezard and Shurkin 2015, 40.
[806] Wing 2013a, 481; Sears 2013, 450; Sidibé 2012.
[807] Chivvis 2016, 61.
[808] Dubuy 2013, 5.
[809] Guichaoua and Pellerin 2018, 49.
[810] Callimachi 2013b.

Similarly, in Timbuktu, AQIM set up a toll-free telephone number for individuals to call to report harassment by MNLA members or "ordinary bandits."[811] A memo written by Al Qaeda emir Abdelmalek Droukdel to his commanders in the region reveals that AQIM was well aware of its dependence on populations' support, as it cautioned them against alienating the population through overly harsh sharia law.[812] As such, "the AQIM strategy was a careful and gradual one of integration and penetration into local communities based on a combination of military, political, religious, economic, and humanitarian means."[813]

In terms of justice, the portrayal of these groups' rule as simply the "unilateral whim of blood-thirsty sociopaths"[814] obscures how these groups replaced the provision of law and order by the state, which was deemed absent and "often perceived as illegitimate,"[815] and provided at least a certain kind of order, despite the radical forms of social mores and punishment.[816] Many inhabitants of Gao and Timbuktu during the jihadist occupation in 2012 even opined that "the justice administered by the qadis on behalf of AQIM was fair and effective."[817] This view chafes with how the trials, sentences, and punishments administered by these groups would likely be considered war crimes under international criminal law.[818] As Notin notes, Prime Minister Diarra's references to the "mutilations, amputations, rapes, and barbarous acts" showed he "knew the words to use to keep France's support," but "said nothing on the other hand of the money distributed by jihadists and the order, albeit very authoritarian, that they re-established and that some of the population welcomed."[819] Indeed, facing the impunity of state officials and the lack of access to justice, "the reinstatement of fair justice" is one essential way for the state to "rebuild trust with the populations and thus nibble away at the legitimacy enjoyed by the jihadist groups."[820]

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[811] Bøås and Torheim 2013, 419.
[812] Callimachi 2013a.
[813] Bøås and Torheim 2013, 419.
[814] Boulehlel, Guichaoua, and Jezequel 2017.
[815] Boulehl et al 2018.
[816] Anecdotally, one individual living in Gao explained that, even though he could no longer smoke or listen to music, he could at least leave his house door unlocked – something he had never previously been able to do. Interview with former member of the French Ministry of Foreign Affairs Laurent Bigot, Paris, 25 May 2015.
[817] Guichaoua and Pellerin 2018, 49.
[818] The passing of sentences by courts that are not regularly constituted is a war crime according to Article 8 (c)(iv) of the Rome Statute.
[819] Notin 2014, 118.
[820] Guichaoua and Pellerin 2018, 95.

This is not to minimise the grave and criminal abuses carried out by these Islamist groups in the name of fundamentalism. Rather, it helps explain how branding the armed groups as criminal helps depoliticize them and thereby render the Malian political elite ontologically unproblematic by obscuring how the Malian state's predation and absence in northern regions prompted them to seek alternatives and contributed to the conflict. The use of terms such as 'criminal', 'barbaric', as well as 'Islamist', 'jihadist', 'Salafist', and 'terrorist' to illustrate the risk of conflict diffusion by tapping into the broader 'war on terror' contributes to making "the authority of Malian political elites unproblematic."[821] In other words, focusing on the 'terrorist as international criminal' helps the government deny that the existence of these groups "is a symptom of a deeper national problem that would require a political solution" involving the groups that have adhered to these terrorist groups.[822] The focus on the criminality of armed groups, while crucial, obscures how the sources of criminality and beneficiaries of rampant impunity were more widely distributed.

Coercive Leverage

Towards Armed Groups

Beyond shaping the ideational framing of the (il)legitimacy of various interlocutors in the context of peace negotiations, authorities used the imperative of pursuing justice for grave abuses to boost its ability to establish effective control over the territory. The situation in 2012 was dire. Speaking in July 2012, Prime Minister Diarra stated, "I sleep in fear because, with all these groups in the north, we will become another Somalia if the south becomes weak."[823] Rather than epiphenomenal, a combination of threats of prosecution, the ICC self-referral, and measures to obstruct accountability was used as a means of coercive leverage to regulate both inter- and intra-party power relations, both between the government and the armed groups as well as between civilian and military authorities within the Malian government.

First, as mentioned above, the Malian authorities decided to self-refer to the ICC in May 2012 and issued an official request for the ICC to open an investigation in July 2012.

[821] Charbonneau and Sears 2014, 200.
[822] Branch 2007, 191.
[823] Diarra 2012.

According to Prime Minister Diarra, this was intended to incentivise groups to leave the battlefield and join the negotiating table – in line with the expectations of proponents of pursuing justice within conflict. A few days after the self-referral, Prime Minister Diarra explained to a crowd of Malian political elite in a televised interview that the appeal to the ICC would encourage defections among members of armed groups who wanted to dissociate themselves from 'terrorist' groups, thereby weakening the groups' power and increasing the likelihood that they accept to join the negotiations. "When you have to negotiate with groups, it is evident that every time one of these groups is weakened, your negotiating position is strengthened." Prime Minister Diarra then explained that the MNLA had been chased out by Ansar Dine, MUJAO, and AQIM, and "is now going everywhere where negotiations could potentially take place, and says it is ready for negotiation." He continued, "the Keeper of the Seals and Minister of Justice self-referred to the ICC for certain acts and, through this, I am sure you will soon see other groups that will want to dissociate from all that, and little by little brings us to an optimal position where negotiations could begin." Since the army would meanwhile be gaining strength "and gaining the spirit of battle," such defections would "certainly put us in better conditions than three months ago."[824] In this sense, the self-referral was intended to boost the likelihood of generating a ripe moment for negotiations.

At the same time, as explored in the previous section, the government's genuine ability and willingness to officially engage in such negotiations with the MNLA during this time is questionable. In terms of inability, the civilian governmental authorities "did not have the political backing needed to make concessions" due to its transitional interim nature.[825] Also, it faced strong resistance to negotiations from a political minority in Bamako who were allied with the military.[826] In terms of unwillingness, the government did not formally negotiate with the MNLA and Ansar Dine, who were already engaged in negotiations organised by Burkina Faso and Algeria. Explaining why the government was not negotiating with any groups, the Prime Minister stated, "there is no one currently on the ground with whom we can be advised to negotiate…those with whom we are ready to negotiate [the MNLA] are spread around Nouakchott, Niamey, and Ouagadougou."[827] The reasoning that negotiations with the MNLA

[824] Diarra 2012.
[825] Bergamaschi 2013, 5.
[826] Lecocq et al 2013, 354.
[827] Chatelot 2012.

are not possible as they are outside of Mali is relatively weak, as the government could have engaged in negotiations organised by Burkina Faso and Algeria.

Rather, the government did not wish to formally negotiate with armed groups as it perceived the conditions were not ripe, due to the continued threat posed by the armed groups. Diarra explained, "a good negotiation, in good faith, cannot be done with a knife under the throat."[828] Further illustrating his scepticism towards negotiations, Diarra noted in September 2012, "The crisis has lasted eight months and I have not seen any non-military solution emerge. On the other hand, the situation is worsening every day with amputations, flagellations, rapes, and destruction of our sites in the north."[829] In sum, while the government stated its hope that the self-referral would convince members of armed groups to defect and join negotiations, a likely ulterior motive was also to weaken all groups and boost its own position, which would overall hopefully help facilitate a ripe moment for negotiations with non-terrorist groups.

Towards Sanogo

Second, Bamako's ability to exercise effective control over the north hinged upon international military assistance from African states and other countries, namely France and the US. However, the unconstitutional nature of the Sanogo's junta-led government prompted the suspension of Mali by the AU and ECOWAS, the application of sanctions by neighbouring ECOWAS states, and the suspension of military partnerships with other countries. Re-establishing civilian control over the government was thus a necessary step towards re-establishing governmental control over the territory. However, in light of the reality of Sanogo's continued power over the military and his strong spoiler power, he was perceived as highly politically valuable to the maintenance of some semblance of order and the reestablishment of governmental control over the territory, meaning his demands had to be placated.[830] The challenge was to manage the tug-of-war between Sanogo and civilian leaders as well as the need to respond to outrage against Sanogo and his supporters in light of their alleged involvement in the deaths of fellow soldiers.

[828] Diarra 2012.
[829] Chatelot 2012.
[830] For more, see Lecocq 2013.

Reflecting this complexity, civilian leaders adopted somewhat contradictory justice-related measures to regulate intra-party relations. In order to incentivise Sanogo to cede power to a transitional civilian government and thereby eliminate a key obstacle to obtaining international military assistance to help re-establish the government's control over its territory, the Malian government first offered a limited amnesty for Sanogo and the "putchists" which formally respected the normative prohibition against amnesty for serious abuses, but which nevertheless signalled to Sanogo that he would benefit from impunity. This was evident in the phrasing of the Framework Agreement on the Implementation of the Solemn Commitment deal brokered with him on 6 April 2012. The agreement included a commitment that the National Assembly would pass a general amnesty for Sanogo and his associates.[831] As Melly explains, "the vast bulk of Malian political parties [had] united against the coup and indicated they could use their control of the national assembly to pass an amnesty for the putchists if civilian rule is soon restored."[832] However, before the National Assembly passed this act, the attempted counter-coup by the elite Red Berets squad took place on 30 April – 1 May 2012. According to a human rights researcher who investigated the disappearances at the time, there was ample evidence pointing to the responsibility of Sanogo and his supporters for the disappearances of twenty Red Berets members.[833] The amnesty act that was passed unanimously by the National Assembly several weeks later on 18 May 2012 respected the prohibition for amnesty for international crimes as it did not technically cover the alleged killings, as the events took place on 30 April – 1 May 2012, outside the temporal limits of the amnesty law which only applies to various acts conducted in relation to the mutiny between 21 March – 12 April 2012.[834] The amnesty indeed did not arise as an issue in Sanogo's later trial for these abuses.

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[831] Chapter 3 "Framework Agreement on the Implementation of the Solemn Commitment," also known as the "Accord Cadre de Ouagadougou", Ouagadougou, 6 April 2012. [on file with author]

[832] Melly 2012.

[833] Phone interview with a researcher from an international human rights organisation, 5 April 2018. Interview with member of the Ministry of Defense, Paris, 25 November 2016.

[834] According to the 'Amnesty Law for Coup d'Etat leaders' (*Loi No2012-020 du 18 mai 2012, portant amnistie des faits survenus lors de la mutinerie ayant abouti à la démission du président de la République),* "les infractions ci-après citées, ainsi que leurs tentatives ou complicités, prévues et punies par les textes en vigueur, commises sur le territoire national du 21 mars au 12 avril 2012 en lien avec la mutinerie ayant abouti à la démission du Président de la République sont amnistiées : mutinerie, atteinte à la sureté intérieure de l'état, atteinte à la sureté extérieure, destruction d'édifices, opposition à l'autorité légitime, violences et voies de fait, embarras sur la voie publique, homicide volontaire, homicide involontaire, coups et blessures volontaires, blessures involontaires, enlèvement de personnes, arrestations illégales,

While the amnesty act did not formally provide amnesty for grave abuses, the way in which Malian authorities justified the amnesty act as a means for the recovery of territorial integrity highlights how the amnesty was nevertheless conceived and interpreted as a means to signal to Sanogo that he should not feel vulnerable to prosecution, since he was crucial to re-establishing control over the north. According to the president of the National Assembly's Legal Commission, "The amnesty law, it is not an impunity award. It is an essential element to resolve the crisis. It will allow us to focus on the essential, which is the recovery of territorial integrity and peace in the north. We have voted the law for our country, for the stability of the country, to enable partners to come to Mali's assistance."[835] Despite their clearly difficult relationship, the interim President Dioncounda Traoré said he believed the ex-putschists would play an important role in the liberation of the north.[836] According to a UN official, "Politically, providing amnesty to the soldiers aimed to facilitate a return to constitutional order. It was also a means to reassure the putchists, to assure them that there would be no vengeance against them."[837] Put simply, while the amnesty does not cover grave abuses, thereby respecting the prohibition against amnesties for grave abuses and acknowledging the anti-impunity demands expressed by many in Bamako, Sanogo would not have ceded power if he feared he would be prosecuted for the Red Berets case.

This reflects how the parameters of accountability are often drawn according to the political value of those potentially accused. Indeed, accommodating Sanogo was crucial as his considerable influence within the military made him a particularly valuable player in transitioning to a civilian government and mobilising the army – both essential to the government's quest to restore its effective control over the territory. According to International Crisis Group, Sanogo "still represents the army factions that are in control of the security apparatus, thus having the capacity for repression," and still has influence over the garrison town of Kati, "an undeniable centre of power that continues to escape the civilian transitional authorities' control."[838] Sanogo thus "held the upper hand in a divided military that neither Traoré nor Diarra could control. This triangulated form of authority was inherently unstable,

séquestrations de personnes, dommage volontaire à la propriété mobilière et immobilière d'autrui, incendie volontaire, pillage, extorsion et dépossession frauduleuse, vol qualifié, vol, atteinte à la liberté du travail, atteintes aux biens publics".

[835] RFI 2012.

[836] RFI 2012b.

[837] Phone Interview with a MINUSMA official, 22 September 2017.

[838] ICG 2012b, 2.

and real power lay in the garrison town of Kati."[839] This need to engage with Sanogo was clear in an agreement reached on 20 May 2012 between the interim President Traoré, Prime Minister Diarra, and Sanogo, in which it was agreed that these leaders must uphold the best possible relations through regular meetings.[840] Sanogo's power within the ruling triumvirate in Bamako continued even after he stepped down, thereby limiting the transitional government's authority in addressing the country's complex problems.[841] For instance, just a few weeks after the amnesty act in late May 2012, Sanogo supporters beat interim President Traoré nearly to death in the Presidency building. Further, on 11 December 2012, Prime Minister Diarra resigned after being arrested by Sanogo's supporters within the army, which "merely confirmed that the army junta continued to hold power, despite the window-dressing of the civilian government, whose presence it resented."[842]

In parallel, and reflecting the difficult relations within the ruling triumvirate, the Malian government used the self-referral of the situation in Mali to the ICC, placing all Malians under ICC jurisdiction, as an implicit source of pressure over Sanogo. As Lecocq notes, "to their credit, both Traoré and Diarra tried to curb the power of putsch leader Captain Amadou Sanogo behind the scenes, mainly by lobbying for international intervention."[843] The Council of Ministers, led by Prime Minister Diarra, decided to self-refer to the ICC on 30 May 2012, just two weeks after the amnesty deal. This decision ushered in the possibility that the ICC, by virtue of its independence, could undermine the tacit protection from accountability afforded to Sanogo and jeopardize the delicate balance of power within the triumvirate government. Asked whether his government pursued a contradictory policy towards Sanogo, Diarra first vehemently denied that Sanogo had received such general amnesty from prosecution, insisting heavily on his government's respect for such normative prohibition. He was also clearly very aware of the implications of the ICC's independence. Insisting that justice for all crimes must be pursued, irrespective of the target's political profile, Diarra stated he would not contest potential investigations of Sanogo and others responsible for the Berets Rouges case if such prosecutions developed. Asked whether Sanogo objected to the government's decision to self-refer to the ICC, Diarra noted that nothing was said as the decision received relatively little

[839] Lecocq et al 2013, 348.
[840] 20 May Agreement [on file with author].
[841] Bergamaschi 2013, 4.
[842] Nossiter 2012.
[843] Lecocq 2013, 61.

attention at the time.[844] Reading between the lines and in light of the tension between Diarra and Sanogo, Diarra's decision to self-refer to the ICC, among other effects, served as a source of pressure by placing a Damocles' sword above Sanogo's head by opening the door for international prosecution.

In sum, in light of his strong spoiler power and his high politico-military influence,, accommodating Sanogo's concerns for impunity was deemed crucial to the government's objectives to recover the north and stabilise Mali. As such, the amnesty act was arguably a measure that, while formally limited to certain crimes, was nevertheless a tacit general amnesty to incentivise Sanogo to cede power. This amnesty thus both enabled government actors to display its respect for the prohibition against amnesty for such grave abuses, thereby upholding its commitment to human rights and responding to public outrage, while also signalling to Sanogo that he would not be prosecuted. At the same time, the door was kept open to prosecutions at both national and international levels. Diarra's self-referral decision indeed illustrates how self-referrals can be used to regulate power relations within a country but also within a government. More broadly, this illustrates how the government's strategic approach of the anti-impunity norm can serve as a means of coercive leverage, through both incentives and pressure. It also shows how enforcing accountability can not only shape the power of interlocutors, but is also shaped by the power of interlocutors and thus the anticipated cost-benefit analysis of holding them accountable for crimes.

Mobilisation for Neutralisation

While the reestablishment of civilian rule was a crucial step in gaining support for an African-led military operation against northern groups, such operations did not swiftly materialise. Preparations for military operations were slowed by a lack of international attention to the Mali crisis as well as low confidence in the feasibility of organising a robust African-led operation. Appealing to the anti-impunity norm was one of the resources drawn upon to overcome the lack of momentum for the military option**.** Indeed, actors in support of this plan deployed considerations of international criminal law and the duty to respond to

[844] Interview with former Prime Minister Cheikh Modibo Diarra, Paris, 11 September 2017.

abuses in shifting ways to build political support and justify military neutralisation of an "enemy of mankind."

Resistance to military operations came from various sources. Domestically, while President Traoré and Prime Minister Diarra strongly requested external (preferably French) intervention, Sanogo opposed such plans. Internationally, views were split. Since Hollande's presidency began in May 2012, France officially supported plans for an African-led operation envisioned by ECOWAS and sought to play a facilitating role, consistently declaring France would not have any troops on the ground.[845] However, the regional heavyweight Algeria pushed for a political solution to the crisis through talks with MNLA and Ansar Dine, opposing external intervention until early 2013. The United States was also very reluctant to support a military intervention, pushing instead for elections to take place prior to any military operation.[846] After ECOWAS passed a plan to deploy 3,300 West African troops to expel the terrorist groups from northern Mali, the US Ambassador to the UN referred to the plan as "crap" [847] and the UN Secretary-General Ban Ki-Moon, more diplomatically, expressed reservations against an immediate military intervention.[848] Nevertheless, the UN SC adopted Resolution 2085 on 20 December 2012, which approved the deployment of the African-led International Support Mission in Mali (AFISMA). Yet, on 11 January 2013, French-led Operation Serval was swiftly launched to respond to the surprise southward advance by armed groups.

As seen through content analysis of 24 declarations by the French President François Hollande, Minister of Foreign Affairs Laurent Fabius, Minister of Defense Jean-Yves Le Drian, and Ambassador of France to the UN Gérard Araud between June 2012 and February 2013, French leaders deployed anti-impunity considerations in shifting ways as a resource to build political momentum for intervention and to overcome the lack of interest and the scepticism throughout 2012 regarding the viability and desirability of international intervention. At first, French officials drew upon the cultural symbolism of war crimes in Timbuktu to highlight the

[845] French officials nevertheless had reservations as to the plan's viability and widely thought some type of French intervention would be inevitable. For instance, France had doubts because the ECOWAS meetings "were inconclusive and the feeling in Paris was that many African players wanted to benefit from the Malian crisis, but were not interested in solving it." Marchal 2013a, 488.
[846] According to one US official, "It was troubling to hear heads of state talk about a West African Force that didn't exist." Chivvis 2016, 82-86.
[847] Lynch 2012.
[848] UN News 2012.

need to respond forcefully to the destruction of humanity's heritage. This served as a guiding thread in building the conflict diffusion thesis, thereby justifying the need for military intervention in this new front in the 'global war on terror.' In early July 2012, just before the UN Security Council planned to discuss the possibility of an African-led military operation, Minister Fabius specifically highlighted the destruction of mausoleums in Timbuktu as "abominable gestures" that reflect "a totally fundamentalist conception of human beings and religion." He stated, "We had Afghanistan, there must not be a Sahelistan…it threatens not only Mali, which needs to re-establish its [territorial] integrity, but also the region." Fabius called for the resolution to be adopted as it would provide the legal framework for a series of measures taken by "our African friends."[849] The ICC Prosecutor's statement on 2 July 2012, that the deliberate attacks against historical monuments and destruction of buildings dedicated to religion is a war crime, reinforced this call. The next day, on 5 July 2012, the UN Security Council unanimously adopted the non-committal Resolution 2056 (2012), which noted the request of ECOWAS and the AU for a UN mandate authorizing a stabilisation force. Shortly after the resolution was passed, Araud again invoked humanity's heritage to underscore the resolution's importance.[850] As Charbonneau and Sears note, "only in July 2012, after the destruction of the Timbuktu mausoleums, was French Ambassador to the UN, Gérard Araud, successful in passing" this resolution.[851]

Both ECOWAS and the AU also called for prosecutions for the destruction of Timbuktu mausoleums and other international crimes in its advocacy for military operations. In a statement on 7 July 2012, ECOWAS called upon Mali "to request a UN-backed military intervention in order to win back the country's north" and called upon the ICC "to proceed with necessary investigations to identify those responsible for war crimes and to take the necessary action against them."[852] Similarly, in expressing its support for ECOWAS preparations for military arrangements, the AU called for prosecution of the perpetrators of the "senseless and unacceptable destruction of the cultural, spiritual, and historical heritage of this region, notably in Timbuktu" and "urges that the perpetrators be brought to justice before the

[849] AFP 2012.
[850] Araud 2012b; Araud 2012a.
[851] Charbonneau and Sears 2-14, 197.
[852] ECOWAS 2012.

relevant international jurisdictions."[853] Interestingly, both statements of regional support for Mali's decision to self-refer to the ICC were issued prior to Mali's official self-referral.

Returning to French discourse, French officials shifted discursive tracks and instead minimised questions of human rights abuses as it sought to 'sell' the 11 January 2013 launch of Operation Serval. While the intervention was legally justified based on the Malian government's consent and request for the intervention, France sought to generate political support for the intervention. In doing so, French leaders framed the intervention as a short-term necessary intervention to defend Malian territorial integrity against "terrorist aggression," rather than on a sense of protection of civilians against abuses. According to the director of communications for the Minister of Defense, it was decided that focusing on the terrorism angle would best rally support for the intervention.[854] Over fourteen speeches between 11 and 28 January 2013, President Hollande, Minister Fabius, Minister Le Drian, and Ambassador Araud referred to "aggression" nine times and "terrorists" seventy-three times. They did not refer to "criminals" after the first day of the intervention on 11 January 2013 and there was no specific reference to an international responsibility to protect the Malian population against human rights abuses.[855] The three-pronged objective of the intervention was outlined as: halt the terrorist aggression that sought to control the entire country, securitise Bamako, and enable Mali to regain its territorial integrity.[856] The team also introduced the term "jihadist terrorist groups" ("groupes djihadistes terroristes"), going one step beyond the common reference to "jihadist groups."[857] Framing the intervention as a fight to defend a state's sovereignty against aggression of terrorist groups was indeed more convincing for other UN Security Council members than justifications based on the protection of human rights.

In another discursive shift, the vocabulary of international criminal law, and imperative to respond to the war crime of destroying cultural heritage in Timbuktu, resurfaced as central in the *ex post facto* justification for the intervention. Hollande had previously anticipated the resonance of responding to this war crime. On 21 January 2013, in a meeting with the Ministry of Defence during Operation Serval, Hollande insisted for the army to recapture Timbuktu prior

[853] African Union 2012, 2.
[854] Henke 2017, 316-317.
[855] Minister Fabius explained that the intervention's "political legitimacy" was based on responding to the threat posed by "terrorist and criminal groups," a term he repeated eight times in one press conference on this first day of the intervention. Fabius 2013.
[856] Hollande 2013a.
[857] Henke 2017, 316.

to his scheduled visit on 1 February 2013. According to one of Hollande's advisors, "The operation had to have strong media impact. The town of Gao? This was not known to people. Unlike mythical Timbuktu."[858] In his now famous visit to Mali in early February 2013, Hollande justified the intervention as an illustration of France's historic tradition of defending universal human rights and the importance of curtailing the jihadists' ability to commit crimes with impunity. For instance, raising the issue of human rights for the first time as a justification for intervention, Hollande referred to human rights three times as he explained why France decided to intervene.[859] To visually illustrate what the intervention protected, Hollande specifically went to Timbuktu, visited a destroyed mausoleum and the Ahmed Baba library for ancient manuscripts accompanied by UNESCO's Secretary-General, and committed French support for the reconstruction of Malian cultural sites. "[W]e cannot accept what happened in Timbuktu… as it is the heritage of Mali but also because it is the heritage of all of humanity that you are in charge of."[860] Hollande later explained, "what I wanted to signify by my presence in Timbuktu with the imam [of the Grand Mosque of Timbuktu] was that what we did was intended to liberate and to enable that religious sites as well as elements of cultural heritage, namely manuscripts, could be preserved and safeguarded."[861] A few weeks later, at an event for International Women's Day, Hollande explained that France intervened in Mali "because there were women who were forced to wear the veil without their consent, there were women who no longer dared leave their homes, there were women who were beaten because they wanted to be free…We want to fight against terrorism, against barbarism, against fundamentalism."[862] A few months later in September 2013, Hollande stated, "We set an example for the world: when law is violated, when women and children are massacred, it is at that moment that the international community must rise. That is the lesson of Mali, that is the message of Bamako."[863]

In his speech in Bamako, Hollande also explicitly insisted on the Malian government's responsibility to prosecute the crime of destruction of cultural heritage, as well as other human rights abuses. President Hollande declared, "there must be no impunity for these acts. But it is

[858] Notin, 2014, 275.
[859] The intervention's achievement was to display "that human rights are valued everywhere, on all continents…Doing so, France rose to uphold its history, the Republic, human rights, and thus democracy." Hollande 2013b.
[860] Hollande 2013b.
[861] RFI 2013a.
[862] L'Express 2013.
[863] Hollande 2013c.

up to the Malian justice, international justice, the International Criminal Court to ensure that there is just punishment for these crimes." Further, commenting on the quality of that justice, he insisted that justice must be fair and explicitly linked the Malians' responsibility to prosecute and the quality of the justice meted out as a sign of its legitimacy in the eyes of the international community: "You must be exemplary. The international community is watching you. Yes, we must punish the criminals, the terrorists, but we must do so, you must do so, in respect of human rights – those very rights that were violated, cheated by the terrorists."[864] Spotlighting the Malian government's responsibility to render full and fair justice for these crimes further justified the French intervention, as it reifies the narrative that France forcefully defended a responsible and law-abiding government from terrorist-criminal opposition. Thus, after being first drawn upon to generate support for an African-led operation, and then minimised during efforts to "sell" Operation Serval in January 2013, the need to respond to the war crime of destroying cultural heritage sites and other abuses was used to bolster *ex post facto* justification for the intervention. This is not to argue that the way France justified the intervention did not genuinely represent its intentions. Rather, the uneven invocation of the anti-impunity norm highlights how it was used selectively as a discursive resource to further evolving strategies to bolster the government's ability to exercise control over its territory.

Reinforcing this discourse, the ICC Prosecutor decided to open an official investigation in Mali on 16 January 2013, just five days after the launch of Operation Serval. The Prosecutor portrayed this decision as part of its role as a constructive actor rather than a liability. "Justice can play its part in supporting the joint efforts of the ECOWAS, the AU, and the entire international community to stop the violence and restore peace to the region. Key regional and international organisations have acknowledged the need for justice as part of the resolution of the crisis in Mali."[865] Dijxhoorn suggests that "for Western governments, besides the UN Security Council resolutions, an ICC investigation into war crimes probably made it easier to 'sell' sending troops to Mali to their home constituencies, and, initially, more governments signed up to provide troops than were needed."[866] While perhaps true, the link between the ICC investigations and domestic audience support for troop commitments is unclear. In any case, despite concerns regarding whether the ICC should be "following the flag" of intervention, there is no clear evidence to suggest that this announcement was timed in order to further

[864] Le Monde 2013a.
[865] Office of the Prosecutor 2013a.
[866] Dijxhoorn 2017, 169.

legitimise the intervention.[867] French officials who worked at the Ministries of Defense and Foreign Affairs at the time were not aware of any coordination between the ICC and France.[868] According to ICC officials, the Prosecutor had been gathering and assessing evidence since the Malian self-referral in July 2012 and the announcement of the decision to open an investigation was not taken in relation to the French intervention.[869] In contrast to the OTP's previous practice, the ICC Prosecutor published an extensive report on Mali when it announced its investigations, meaning the decision to launch an investigation was not made hastily.[870]

As if responding to the call President Hollande made during his speech in Timbuktu for Mali to prosecute crimes committed during the crisis, Malian Prosecutor General Daniel Tessougué issued arrest warrants several days after Hollande's speech against 28 armed group leaders. Those subject to arrest warrants included key players from all types of armed groups, including prominent actors such as MNLA's Bilal Ag Cherif and Ansar Dine's Iyad Ag Ghaly.[871] The seventeen charges included crimes against humanity, war crimes, genocide as well as terrorism, sedition, crimes against integrity of the state, pillaging, crimes of racial and ethnic character.[872] The Prosecutor General's strategy of charging leaders of all types of armed opposition groups, conflating their criminality rather than distinguishing between 'legitimate' non-terrorist and 'illegitimate' terrorist groups, is another illustration of how Malian actors used the anti-impunity norm to diverge slightly from the strategy adopted by the UN SC and key international mediators. As addressed in Chapter 7, the arrest warrants later complicated the political dialogue between Bamako and 'non-terrorist' groups.

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[867] Vinjamuri 2013b.

[868] Interview with former member of the French Ministry of Foreign Affairs Laurent Bigot, Paris, 25 May 2016. Interview with member of the French Ministry of Defence, Paris, 25 November 2016.

[869] Interview with two ICC officials, The Hague, 21 September 2016.

[870] Even if the announcement had been delayed to somewhat coordinate with the intervention, the ICC would not likely admit it takes decision as a function of military operations.

[871] The full list includes: MNLA (Bilal Ag Cherif, Mohamed Djeri, Mohamed Ag Najim, Hamma Ag Mossa, Deity Ag Sidimou, Ibrahim Ag Mohamed Assaleh, Iglas Ag Oufen, Baye Ag Dicknane, Moussa Ag Assarid, Abdallah Ag Albakaye, Mahdi Ag Mohada); Ansar Dine (Iyad Ag Ghaly, Algabass Ag Intallah, Ahmada Ag Bibi, Cheick Ag Aoussa, Sidi Mohamed Ould Boumana); MUJAO (Cherif Oul Attaher, Abderhamane Ould El Emr alias Ahmed El Tlemsi; Aliou Mahamane Touré); AQIM (Oumar Ould Hamaha; Amada Ag Hama; Soultane ould Baby; Drug traffickers (Mohamed Ould Ahmed Deya; Dina Ould Daya; Mohamed Ould Sidati; Baba Ould Cheick; Mohamed Ould Awainat; Abinadji Aga Abdallah).

[872] ORTM 2013; JeuneAfrique 2015c.

Conclusion

Over the course of Mali's *annus horribilis*, strategically deploying anti-impunity measures played a role in furthering the government's objectives. Indeed, Malian actors exploited the norm's villainizing/privileging function to frame the government's legitimacy as a member of the international community through the delegitimation of its opposition writ large, thereby resisting international pressure to negotiate with MNLA and Ansar Dine, despite their alleged responsibility for international crimes. Malian authorities also capitalised on the norm's power-shaping functions by using it as coercive leverage against certain actors and as a rallying call to overcome resistance to using force to neutralise groups.

The anti-impunity norm thus provided interpretive and justificatory resources to further the government's preferred implementation of the two-pronged strategy to boost Mali's authority over the north: by resisting negotiations with 'non-terrorist' groups and by mobilising for the neutralisation of all groups through force and through law. Drawing on the anti-impunity norm was indeed one way in which "interim authorities clearly capitalised on a widespread perception of an Islamist threat, and it effectively garnered international support for the Malian government at a time when its domestic standing was doubtful."[873] Invoking the anti-impunity norm overall helped boost the government's claims of being a legitimate member of the international community and its plans to re-establish effective control over its territory – and thus boost the government's legitimacy vis-à-vis its opposition. The following chapter considers how actors' implementation of anti-impunity measures served to influence the political dynamics in the next phase of the conflict, starting in the wake of Operation Serval.

[873] Bergamaschi 2013, 111.

Chapter 7: Post-Operation Serval: Negotiating Peace (2013-2018)

Introduction

While Operation Serval was hailed as having brought Mali back from the brink of dissolution, it ushered in a phase during which decisions taken would "either make or break Mali."[874] During this phase, which can certainly not be called 'post-conflict' though perhaps 'post-acute crisis,' the broad aim was to bolster "the state's omnipresence, extending the influence of the government across the territory,"[875] namely through negotiating with rebel groups while militarily neutralising terrorist groups - though on an even more complicated landscape than before.

Notwithstanding the profound impunity in Mali for crimes committed during the conflict by all sides, the period since 2012 has ushered in anti-impunity 'firsts' in Mali. As mentioned previously, the government issued a self-referral to the ICC in July 2012, which led to the opening of an ICC investigation in January 2013. The Malian Prosecutor General's decision to issue arrest warrants, including for charges of war crimes and crimes against humanity, against 28 leaders of all armed groups in February 2013 was welcomed as "a remarkable and hopeful shift in the government's role."[876] While the vast majority of crimes committed in Mali have gone unaddressed, the trials of four individuals stand out as landmark moments in the struggle against impunity in Mali. One of the two trials held nationally even marked the first time the charges of war crime and torture were confirmed in judicial proceedings in Mali concerning conflict-related crimes. The trials at the ICC marked the first time the charge of destroying religious buildings was the sole charge in a case before an international tribunal. In addition, in the roadmap adopted in January 2013, one of the preconditions under which talks with armed groups would be held was that "crimes against humanity and war crimes committed during the period of belligerence should not go unpunished." Truth commissions were created, which are mandated to, inter alia, record cases of human rights violations. Human rights groups welcomed these measures that showed the government is "establishing a national framework conducive to the exercise of justice,

[874] Bøås and Torheim 2013, 418.
[875] Sears 2013, 445.
[876] Wing 2013b, 11.

beginning with international crimes."[877] These measures appear to respond to popular calls for accountability. According to a survey conducted in late 2013 and early 2014, "Malians are determined to hold executors of political violence to account," with a large majority of respondents (74%) preferring legal prosecution to other options, including amnesties and truth-seeking.[878]

This chapter thus traces the interaction between the "political" and "justice" tracks in Mali, starting in the wake of Operation Serval in February 2013, spanning through continued insecurity and formal peace negotiations, and ending with the presidential elections held in July 2018. During this period, the Malian authorities pragmatically implemented the anti-impunity as a resource to favour the reification of the government as legitimate, both in reputation and in its ability to effectively control its territory. Indeed, similarly to the dynamics explored in the previous chapter, implementing the anti-impunity norm strategically served as a resource to brand, coerce, and neutralise the opposition - though in different ways in light of the governent's broader strategy to further formal peace negotiations with groups labelled as non-terrorist groups. This was achieved by capitalising on the norm's enforcement feature, the state's relative centrality in navigating the flexibility around the normative prohibition against amnesties for international crimes as well as in determining its (in)ability and (un)willingness to prosecute certain cases, both at the national and international levels.

Background

The temporary dispersal of northern armed groups following Operation Serval prompted a significant reconfiguration both on the battlefield and in the political landscape of northern Mali, with the proliferation of both 'terrorist' and 'non-terrorist' armed groups. On the battlefield, international troops remained as Operation Serval gave way to Operation Barkhane and was later joined by the G5 Sahel Anti-Terror Task Force, a counter-terrorism partnership composed of five regional states and backed by France. Alongside these anti-terror operations, a UN peacekeeping force named MINUSMA was established in 2014, taking over from AFISMA. Despite the significant resources spent on fighting the "war on terror," terrorist

[877] FIDH MIDH, and LIDHO 2017b, 8. Avocats Sans Frontières 2018, 18.
[878] Bratton 2016, 438, 449; Bratton, Coulibaly and Dulani 2013; HiiL 2014.

groups have proliferated and gained prominence. AQIM, Ansar Dine, and MUJAO maintained influence and new threats emerged from the creation of the Macina Liberation Front, the return of Al-Mourabitoune, and the merger of several groups into the Group for the Support of Islam and Muslims (*Jama'ah Nusrah al-islam wal-muslimin*, JNIM).

On the political front, in light of the weakness of the government to exercise control over the north, regional and international mediators facilitated extensive negotiations with groups that renounced their separatist aims and denounced terrorism. As declared in the roadmap adopted unanimously by the Malian parliament on 29 January 2013, "the government continues to prioritise dialogue with groups that do not question the territorial integrity and constitution of Mali." In the first few months of 2013, the Malian government began to engage proactively in a process of political dialogue and "signalled a recognition that something needed to be done about the nation's division."[879] Within this associational strategy towards non-terrorist groups, the first major turning point was the signing on 18 June 2013 of the Ouagadougou Accord, o**r** the Preliminary Agreement to the Presidential Election and the Inclusive Peace Talks in Mali, between the MNLA and the High Council for the Unity of Azawad (*Haut conseil pour l'unite de l'Azawad*, HCUA). This agreement led to the Algiers process, a protracted peace process spearheaded by Algeria with the participation of the AU, ECOWAS, EU, France, and various other countries. Talks began in January 2014 and culminated in June 2015 with the Algiers Accord, or the Agreement for Peace and Reconciliation in Mali, signed between the Malian government and two alliances: the pro-government Platform Coalition and the anti-government Coordination of Azawad Movements (CMA).

While these accords were watershed moments in the normalisation between the government and 'legitimate' groups and the stabilisation of Mali, they by no means halted the rate of hostilities and abuses. Between 2013 and 2018, widespread abuses were committed by all parties, including the execution by Islamist armed groups of dozens of government officials, suspected government collaborators, and members of armed groups signatory to the 2015 peace accord, as well as frequent attacks against peacekeepers. The Malian army was also accused of committing atrocities against civilians in the context of counterterrorism operations, namely extra-judicial killings, forced disappearances, arbitrary arrests, torture and ill-treatment, including against Tuaregs, likely as vengeance, and against Peuls, due to conflation between

[879] Bøås and Torheim 2013, 418.

Peuls and members of terrorist groups.[880] Insecurity also increased and spread to central Mali, mainly due to sporadic hostilities between parties involved in negotiations, the proliferation of both terrorist and non-terrorist armed groups, and the emergence of pro-governmental militias.

Villainizing / Privileging Political Interlocutors

As explained in Chapter 6, invoking international criminal law in a counter-terrorism context creates a double enemy of mankind - a threat to human diversity both through its application of fundamentalist ideology as well as through the commission of international crimes. As such, the integration of the anti-impunity norm in conflict settings helps "designate the enemy by denouncing the criminal character of the adversary's activities, the enemy of human kind" [881] and thus "immediately authorises the state's use of violence against 'terrorists.'"[882] In this second phase, the vocabulary of international criminal law continued to serve as an interpretive resource in the strategic branding of the government's opposition– though in a different way than previously.

Signatory Groups vs. Terrorist Groups

Following Operation Serval, and the identification of Ansar Dine as a terrorist group by the United States in February 2013, armed groups splintered, emerged, and reconfigured themselves in order to gain the most optimal position at the negotiating table. This was clear in President Keita's speech at the UN General Assembly in September 2015, as he called on signatory groups to expel from Mali and the Sahel "a common enemy, namely the terrorist groups and narco-jihadists who only seek to satisfy their criminal appetites through fear and terror."[883] In light of the emphasis on negotiations with separatist 'non-terrorist' groups, in which the Malian authorities engaged more genuinely than previously, the concept of the 'terrorist as international criminal' served as a discursive axis around which the government

[880] Amnesty International 2013; HRW 2014; HRW 2017b; HRW 2017c; Amnesty International 2018.
[881] Dubuy 2013, 4.
[882] Charbonneau 2017, 7.
[883] Keita 2015.

distinguished between groups and around which groups branded themselves, as explicit supporters of norms of the international community, namely human rights. In other words, it helped serve as a distinction around which the (il)legitimacy of parties was shaped and helped create an opposition with whom the government could negotiate. In turn, characterising the enemy by its rejection of norms of the international community and its criminality helped further a useful one-dimensional narrative: that negotiations can be held with the non-terrorist and non-criminal groups and that the 'terrorist-criminal' groups must be excluded and neutralised through force. In doing so, it helped draw a contrived distinction between signatory and non-signatory parties and overshadowed complexities, narrowing the narrative.

This was evident in the negotiations that led to the June 2013 Ouagadougou Agreement, signed between Bamako, the MNLA, and the HCUA. Two other groups were also able to adhere to the negotiations without signing the agreement: the Arab movement of Azawad (*Mouvement arabe de l'Azawad*, or MAA) and the self-defense militia the Cooperation of Patriotic Movements and Forces of the Resistance (*Coordination des mouvements et forces patriotiques de resistance*, or CMFPR). The main overlapping characteristic of the diverse signatory groups was their declared renunciation of terrorism and their expressed support of the values of the Malian state, including human rights. Indeed, the vocabulary of human rights is one of the vocabularies upon which "all Malian actors 'buy legitimacy' by appealing to the ideologies and interests of national or international patrons."[884] This helped them portray themselves as foils to the more unsavoury groups: Ansar Dine, MUJAO, AQIM, Al Mourabitoune, Macina Liberation Front, JNIM… *Repoliticising* former foes as non-criminal negotiating partners simultaneously obscures their past, continuing, and shifting links to 'terrorist' groups. For instance, the HCUA was a mix of former MNLA and Ansar Dine members, who sought to distance themselves from those increasingly unpopular groups, especially as Iyad Ag Ghaly had become a persona non grata following the UN sanctions placed on him in February 2013.[885] Similarly, in 2012, the MAA had helped AQIM enter Timbuktu, preferring AQIM to the Tuareg MNLA. It later distanced itself from the terrorist groups and joined the negotiations, considered to be close to the government.[886] The MAA later split into two branches: the MAA-Ould Sidatti branch, which allied with the MNLA and HCUA, and the MAA-Ahmed Ould Sidi Mohamed branch.

[884] Ahram and King 2012, 181.
[885] Sadatchy 2013.
[886] Boutellis and Zahar 2017, 11.

Further, over the course of the subsequent Algiers peace process, groups continued to fragment and (re)form, leading to two large coalitions. The Coordination of Azawad movements, described as anti-government, was made up of the MNLA, the HCUA, the MAA-Sidatti branch, a faction of the Coalition du Peuple de l'Azawad (CPA), and a splinter group of the Cooperation of Patriotic Movements and Forces of the Resistance (CMFPR-2). The Platform coalition, described as pro-government, was composed of the CMFPR-1, the MAA-Ahmed branch, the Imghad Tuareg Self-Defense Group and Allies *(Groupe d'Autodéfense Touareg Imghad et Alliés*, or GATIA), and a splinter group of the CPA. Amidst the fluidity, the prism of 'terrorist as international criminal' helped reify a distinction between signatory groups and terrorist groups that overshadowed the extreme porosity between armed groups, marked by "a dynamic of fusion, scissions, alliance and betrayal."[887] It thus helped obscure the connections between different groups and actors and "how they can navigate the opportunities presented by the new boundaries and binaries enabled by global terrorism discursive framework."[888]

This extreme fluidity is evident in the political trajectories of key leaders. Most clearly, Alghabass Ag Intalla, a prominent Tuareg leader, was an elected representative in the National Assembly prior to the crisis. He worked to create the MNLA, then joined Ansar Dine's leadership as political representative during the 2012 occupation. After splitting from Ansar Dine and creating the Islamic Movement of Azawad (MIA), which then joined the HCUA in May 2013, prior to the Ouagadougou negotiations, which is allied with the MNLA. As Wing points out, his shifting allegiances were opportunistic. "He had come full circle, presumably in order to have the best strategic position in terms of peace negotiations," including by distancing himself from 'terrorists' at the opportune moment. Indeed, following the French intervention, he acted strategically by officially breaking away from Ansar Dine, since Ansar Dine was no longer welcome at the negotiation table after the international community declared it a terrorist movement.[889] However, while Ansar Dine was not officially part of the negotiations, it was widely believed that Alghabass Ag Intalla, as well as several others, represented the interests of Ansar Dine's leader Iyad Ag Ghaly. He later won a seat at the National Assembly and joined none other than President IBK's party.

[887] Lecocq et al 2013, 346.
[888] Charbonneau 2017, 12.
[889] Wing 2016, 62.

This fluidity also extends to ethnic groups. For instance, the Lamhar Arabs are in Mali's "peace camp" as they are in the pro-government Platform coalition. However, they initially supported the MNLA, then allied with MUJAO, before returning to the Malian state's camp.[890] This also translates to the battlefield, as a French military source noted "We observe strong collusion between terrorist groups and certain signatory groups."[891] This porosity even prompted the commander of Operation Barkhane to call for biometric identification of opposition forces in order to identify them, since "the strength of the enemy is mutability [*desilhouettage*]: a jihadist combatant in the morning can be a trafficker at night, a shepherd the next day, and a member of a signatory group (of the Algiers peace accord) the following day."[892] The politics of identifying 'terrorists' and 'separatists' is indeed "multileveled and expresses a variety of contested, uncertain and unstable boundaries and practices."[893]

Overshadowing the Malian State's Role

Overall, the strategies adopted by national and international actors to resolve the Malian conflict are conceived primarily through an anti-terrorism prism, focused on the militarization of the fight against radical Islamist groups. As Charbonneau explains, "Whatever forms the newest political and moral economies might ultimately settle into – what one might call 'durable peace' – is now determined in relation to the perceived necessities of the global war on terrorism."[894] Yet, the anti-terrorism prism obscures factors that encourage radicalism[895] and diverts attention from the underlying governance problems, including weak rule of law, corruption, poor state services, weak decentralisation...[896] Among these underlying problems is widespread impunity for abuses by state security forces, government-affiliated armed groups, and opposition armed groups. While the 'terrorist as international criminal' label duly reflects terrorist groups' rampant commission of abuses against civilians, portraying the Islamists'

[890] Guichaoua and Pellerin 2018, 55.
[891] Studio Tamani 2017; Guichaoua 2017.
[892] Mace 2018.
[893] Charbonneau 2017, 7.
[894] Charbonneau 2017, 4.
[895] Shurkin 2014.
[896] As explained by the former senior official from the French Ministry of Foreign Affairs, "to sum up the security situation in the Sahel to only its 'terrorist' dimension is a dangerous short-cup as it simply distances us from reality." Bigot 2017.

presence and influence as unequivocally oppressive and criminal is also helpful for the government. It overshadows how the way in which the government pursued negotiations and counter-terrorism operations contributed to the emergence of jihadist groups and the violence it sought to curtail. Put differently, this villainization obscures how "an increasing number of Sahelians, especially among the youth, are ready to support and sometimes join these groups in a context where official authorities are performing appallingly."[897] Indeed, abuses by state forces during counter-terrorism operations serves as a potent recruitment tool for jihadist groups, reflecting how "Islamist violence emerges from local conditions and specific experiences of exclusion and marginalisation."[898]

This was a clear contributing factor to the spread of violence from northern to central Mali, especially starting in 2015, where the Ansar Dine-linked group named Macina Liberation Front emerged, drawing from the Peul ethnic group. Human rights organisations have documented many cases in which Peul males suffer mistreatment and torture by the army, which allegedly often accuses Peul men of collaboration with terrorists.[899] These abuses create a "particularly fertile terrain" for these extremist groups in central Mali, who "respond to strong local demands for justice, security and, more broadly, moral standard in politics."[900] According to a researcher for Human Rights Watch, the Peul "insist that their young men are not being wooed over the Internet or joining out of religious conviction, but rather, as one imam told me, 'because the jihadists provide a better alternate to the state.'" When asked how to prevent jihadist recruitment, Peul elders and villagers explained to the researcher that "they want a government whose security forces protect instead of abuse them; whose civil servants serve instead of exploit them; and whose justice system ensures their right to redress."[901] Thus, rather than being driven by Islamist ideology, young recruits were driven by the search for better provision of protection and justice, as the security forces had lost "credibility in the eyes of the population."[902] Feeling victimised by the state exacerbated feelings of political marginalisation among these groups, as they were excluded from the official negotiations, which focused mainly on grievances of northern groups. Similarly to the issues raised in Chapter 6, the abuses

[897] Bouhlel, Guichaoua, and Jezequel 2017.
[898] Dowd 2015.
[899] HRW 2017b.
[900] ICG 2016, 24.
[901] Dufka 2016.
[902] ICG 2016, 22.

by governmental forces and the impunity afforded to them continued to contribute to the spread of terrorist-criminal groups.

Coercive Leverage

The issue of criminal accountability for grave abuses was a significant stumbling block during the peace negotiations, as the national and international arrest warrants issued in February 2013 by the Malian Prosecutor General Daniel Tessougué targeted representatives of armed groups with whom the government needed to negotiate in order to re-establish control over the territory – a key criterion of government legitimacy. However, rather than a constraint, the threat of criminal accountability represented by the arrest warrants was used as a bargaining chip during the Ouagadougou and Algiers peace processes. The section below first traces how the government, encouraged by international mediators, not only built ambiguity regarding justice into the text of the agreements but also lifted the arrest warrants against key interlocutors who were viewed as politically valuable to the negotiations, determined by their status and leverage within a group participating in the negotiations and thus the cost-benefit of maintaining or lifting the threat of prosecution. This was achieved in part by capitalising on the state's centrality in navigating the flexibility in the normative prohibition against amnesties for international crimes. It was also achieved by capitalising on the executive's ability to exert influence over judicial actors in the national administration of justice, facilitated by the "executive dominance, elite patronage, and managed political 'consensus'" that mark Malian governance. [903] Indeed, while Malian governance may be based on "consensus-building," the tendency is deemed both helpful and harmful to stability as the concepts of inclusion and dialogue form a foundational narrative in Mali, though can also favour corruption and nepotism.[904]

[903] Sears 2013, 450.
[904] Straus 2015, 169-204.

As mentioned earlier, the Ouagadougou Accord was a key turning point in the government's objective of boosting its legitimacy by reestablishing control over its territory, as parties agreed to the cantonment of armed groups, a ceasefire, the phased deployment of the Maliam army, and the return of Malian state authority in the north. However, several representatives of the participating MNLA and HCUA were under arrest warrants. According to the former Special Advisor to the African Union High Representative to Mali and the Sahel, who participated in the Ouagadougou negotiations, "I remember being in a room and one of the armed group representatives said, 'I am sitting at the table, but there is an arrest warrant against me.'"[905] To balance the new normative environment of the "age of accountability" with the need to reach an agreement, government representatives and mediators built ambiguity regarding accountability into the agreement.

This is clear in how its content changed over time. A draft version of the accord explicitly called for the lifting of arrest warrants against members of the rebel groups who were signatories to the agreement. Displaying respect for the normative prohibition against amnesties for international crimes, the suspension of these warrants would not apply to "war crimes, crimes against humanity, crimes of genocide, sexual violence and other grave violations of international human rights and humanitarian law."[906] Nevertheless, this caveat was deemed perfunctory. When it was circulated five days before the official signing, the draft prompted strong opposition among the Malian media and politicians, including around the question "how and when will rebels be prosecuted for alleged war crimes?"[907] For instance, Mali's Prosecutor General cautioned, "If the politicians sign this agreement, they will have to answer to History one day. Mali should not humiliate itself again for the billions of euros promised by our international supporters."[908] In light of the public pressure, the final text of the Ouagadougou accord deleted the controversial clause regarding the suspension of arrest warrants against signatory groups - to the disappointment of the armed groups.

[905] Phone Interview with former Special Advisor to the African Union High Representative to Mali and the Sahel, 25 May 2018.
[906] Draft Ouagadougou agreement, Article 17.
[907] Whitehouse 2013.
[908] MaliActu, 2013. Another incentive for signing the deal was that it would unlock 3.2 billion Euros in international aid.

However, rather than clarify the parameters of accountability and reassure critics, the final Ouagadougou Accord featured vague phrasing regarding justice. The final accord did not explicitly include a commitment to lift the arrest warrant, but rather, in Article 18, parties committed to "confidence-building measures" to facilitate the implementation of the Accord.[909] The scope of these "confidence-building measures" was highly unclear. These measures would appear to be more than simply releases of detained belligerents, which was covered in paragraph 3 of Article 18.[910] Also, unlike the draft version, the final accord did not mention that the "confidence-building measures" would not undermine the pursuit of criminal accountability for grave crimes.

This euphemistic reference to "confidence-building measures" did not explicitly include the lifting of arrest warrants, but it was clear to everyone that the arrest warrants would not be enforced. A representative of an international organisation, who participated in the negotiations noted, "There was an implicit understanding that it will be just left inactivated because the government was very sensitive about putting that on paper. That is why it didn't appear in the final agreement…The Ouagadougou process was about the armed groups accepting that presidential elections be held throughout the country, including in Kidal, that was under their control. Whatever would facilitate that, the government would do it. But the government was, on the other hand, under immense popular pressure not to appear lenient vis-à-vis armed groups…It was a gentleman's agreement."[911] In light of reported pressure on the Malian government not to enforce those arrest warrants, observers during the negotiations said the warrants "look likely to be dropped."[912] Regarding the tacit agreement that was reportedly reached, one of the Tuareg delegation's leaders noted, "We will find out if Mali is operating in good faith."[913]

[909] "Les Parties s'engagent en outre à prendre les mesures de confiance appropriées pour faciliter la mise en œuvre du présent Accord."
[910] "A cet égard, elles s'engagent à libérer les personnes détenues du fait du conflit armé dès l'entrée en vigueur du cessez-le-feu." This paragraph could be read as a simple adaptation of Article 6(5) of the Additional Protocol II of the Geneva Conventions, calling for authorities to release those detained due to their participation in the internal armed conflict and providing amnesty for crimes of rebellion, sedition, treason and other "*faits de guerre légitimes*." Avocats Sans Frontières 2013, 36.
[911] Phone interview with representative of an international organisation, May 2018.
[912] AFP 2013b.
[913] AFP 2013a.

Denouncing this ambiguity, the most prominent critic was the Prosecutor General who had issued the arrest warrants, Daniel Tessougué. Shortly after the signing of the agreement, Tessougué stated, "Today, we are speaking of war crimes, crimes against humanity, genocide, which are by definition imprescriptible crimes. We want, through negotiations, to let them pass. Be very careful. We are planting the seeds of impunity. If we plant the seeds of impunity in Ouagadougou, we will collect the flowers of impunity in Bamako." He continued, "Fine, we can walk on cadavers to go to peace, that's the formula. I say now that other groups will conduct themselves the same way and we have impunity…For peace to exist, we also need justice."[914] In contrast, arguing that this ambiguity does not undermine the government's commitment to the anti-impunity norm, the ECOWAS mediator explained that the plan to establish an international commission of inquiry fulfilled the imperative to provide accountability for grave crimes. "It is clearly stated that all those who perpetrated crimes against humanity would be held accountable because they will establish an international commission of inquiry. And no one will be amnestied."[915] Indeed, Article 18 included a commitment to the swift establishment of an independent commission of inquiry for "war crimes, crimes against humanity, crimes of genocide, crimes of sexual violence, drug trafficking and other grave violations of international human rights and humanitarian law." However, a commission of inquiry is not equivalent to a commitment to prosecuting alleged perpetrators of international crimes. It would take five years for an international commission of inquiry to be established.[916] This strategic phrasing thus enabled mediators and government officials to deny having formally consecrated impunity while also facilitating an agreement.

Confirming suspicions of the implied agreement, Malian authorities lifted the arrest warrants in October 2013 for several representatives of the signatory groups, namely Alghabass Ag Intalla (HCUA), Mohamed Ag Intallah (HCUA), Ahmada Ag Bibi (HCUA), and Ibrahim Ag Mohamed Assaleh (MNLA). This was a key demand by the armed group representatives, who even pulled out of the follow-up talks in September 2013 until the government committed to releasing 23 of their members and lifting the warrants. Most clearly, it enabled Alghabass Ag Intallah, Ahmada Ag Bibi, and Mohamed Ag Intallah to run as candidates in the legislative

[914] Diawara 2013.
[915] Boisbouvier 2013.
[916] UN Doc. S/2018/57 (2018).

elections scheduled for November 2013.[917] Welcoming the releases and the lifted arrest warrants, Mohamed Ag Intallah stated, "I think it is helpful to bring back trust between the south and the north. It is a good step but much is left to be done. I am waiting for the government to release those whom we do not see – we already gave them the list. We know where they are."[918] Also, Ahmada Ag Bibi stated, "It is a good sign of willingness to dialogue…We also share this willingness to dialogue."[919]

Lifting the threat of justice for these highly valuable political interlocutors was reached by exploiting the executive power's centrality in the national administration of justice. Indeed, while the executive and legislative authorities have legal means to lift the threat of prosecution, including through presidential pardons and through amnesties voted through the legislature, the lifting of the arrest warrants in October 2013 by judicial actors was outside such formalised means. In other words, capitalising on the executive power's ability to pressure judicial actors, "the government imposed this decision on senior judges, who were extremely hostile to the idea."[920] The judicial authorities had not been consulted prior to the decisions to lift the arrest warrants, prompting the Prosecutor General to consider resigning.[921] Regarding the releases and the lifting of arrest warrants, one diplomat explained, "The government just sort of did it. The Ministry of Justice was not kept in the loop."[922]

Yet, wary of criticism for undermining the pursuit of justice and infringing upon the independence of the justice system, the Minister of Justice Ali Bathily tread an interpretive tight-rope and relied on several justifications to argue that the lifting of arrest warrants did not amount to transactional impunity and to express the government's support of the normative prohibition against amnesties for grave crimes. Minister Bathily noted, "Lifting the warrant is to re-establish their freedom of movement, but it is not to exonerate or clear the person of the charges that they may be facing. So, the investigations continue."[923] He also noted that, since a guilty verdict had not been reached, lifting arrest warrants did not amount to granting impunity. "There is no impunity. An arrest warrant is not a guilty verdict. By lifting the warrant,

[917] Ag Bibi won 96.7% of the vote, with a 71% turnout of registered voters. Mohamed Ag Intalla won 100% of the vote, though only 102 votes were cast and no one ran against him. Pezard and Shurkin 2015, 47.
[918] Duhem 2013.
[919] Duhem 2013.
[920] ICG 2014a, 24.
[921] Phone Interview with a MINUSMA official, 22 September 2017; RFI 2013d.
[922] Interview with a diplomat based in Bamako between 2014-2017, 4 January 2018.
[923] Le Monde 2013b.

we are not putting an end to the investigation."[924] While formally true, such measures clearly strongly disincentivise judicial actors from prosecuting the case.

Moving away from legal rationales, the minister also explicitly linked the lifting of arrest warrants to the political requirements of the negotiations. Asked about the Prosecutor General's complaint that judicial authorities had not been consulted prior to the prisoner releases and the lifting of arrest warrants, Minister Bathily noted, "Regarding what was agreed in the Ouagadougou accords, it is not like the government said, 'I'm innovating and I will inconveniently interfere with the judicial sector.' No, the reason for these measures is that the government must at all time live up to its engagements, including when this involves the judicial sector."[925] The minister explicitly noted how the political value of specific interlocutors was a salient factor. "Since [the arrest warrants], things have evolved on the ground and politically. We have entered into a negotiation cycle under the aegis of the international community… If they are the ones representing the political elements that are likely to take measures to build the restoration of peace, conditions should be created for them to assume the role of negotiators and that would allow the international community to make sure that the negotiations are conducted in the right conditions." He continued, "everything is negotiable, except for territorial integrity."[926] The Minister also noted that the suspension of accountability could lead to more accountability. "And we won't investigate without peace. Lifting the arrest would be a step to move towards more justice."[927] More broadly, other government officials noted the need to offer impunity in order to further the negotiations. Acknowledging the criticism of leniency towards the armed groups, an aide to President Traoré noted, "It was that or nothing, but we were heading for disaster if we hadn't been able to get an agreement on presidential elections in the Kidal region."[928] Further, an official of the Malian Ministry of Justice noted that the arrest warrants against Ibrahim Ag Mohamed Assaleh, Mohamed Ag Intalla, Ahmada Ag Bibi, and Alghabass Ag Intalla were lifted "to facilitate the conduct of the national reconciliation process."[929]

[924] RFI 2013d.
[925] RFI 2013d.
[926] Le Monde 2013b.
[927] RFI 2013d.
[928] AFP 2013b.
[929] Duhem 2013.

Similar transactional impunity was offered as part of the negotiations during the subsequent Algiers peace process. As mentioned above, negotiations between the Malian government and two alliances, the loyalist Platform coalition and the anti-government Coordination of Movements of Azawad (CMA), led to the signing of the Algiers Accord in June 2015 after protracted talks under heavy international pressure. As during the Ouagadougou process, the Malian executive capitalised on its ability to influence the judicial actors in order to empower certain key actors in the peace process and generate an agreement that would enable it to extend its territorial control. Since the beginning of the Algiers process in 2014, the practice of releasing alleged perpetrators of human rights abuses, who have high political value in the eyes of participants in the peace negotiations, was instrumental in ensuring parties reached an agreement. For example, in July and August 2014, as part of a prisoner exchange before the signing of a road map for the Algiers peace process, the government released over forty armed group members, including many alleged perpetrators of grave abuses who were already charged by the Malian justice system.[930]

Further, while the government and the Platform coalition signed the Algiers agreement on 15 May 2015, the CMA refused to sign. Four days later, Malian authorities cancelled arrest warrants against 15 CMA leaders, including the Secretary-General and founder of the MNLA Bilal Ag Cherif and Mohamed Ag Najim, respectively. The charges reportedly included "crimes against humanity, genocide, war crimes" among other crimes such as "undermining state security, crimes of a racial, regional or religious nature, murder, international drug trafficking, and terrorism."[931] According to a governmental source, "The arrest warrants against the leaders of the CMA were lifted at the request of the Malian government. The measure can be considered as a sign of appeasement, a few days between the signing of the accord by the rebels." According to rebel leader Almou Ag Mohamed, it was to "create a conducive climate around the negotiations."[932] Since a High Court judge signed the order lifting the arrest warrants on 15 June 2015, this was not in explicit violation of judicial independence, but rather the result of intense political pressure on judicial actors. While the CMA had delayed signing the peace agreement for other reasons as well, including gaining

[930] FIDH and AMDH 2014a.
[931] Studio Tamani 2015.
[932] JeuneAfrique 2015b.

concession on the return of refugees, security arrangements, and development plans, the lifting of the arrest warrants was a key factor in incentivizing the CMA to sign the agreement as it "helped assuage the concern expressed by CMA leadership over their possible arrest when travelling to Bamako for the signing of the peace agreement."[933] Overall, according to a coalition of human rights groups in Mali, at least 50 alleged perpetrators of crimes against humanity or war crimes who had been arrested were released for political reasons or within the framework of negotiations with armed groups.[934] Most of them had been charged and/or arrested "in connection with crimes under international law and human rights abuses carried out by armed groups in the northern regions in 2012 and 2013."[935]

The practice of building ambiguity regarding justice into the text of agreements was also evident in the long-awaited law on national reconciliation, approved by the Malian National Assembly in June 2018. As part of the increased focus on reconciliation and easing tensions in the country ahead of the presidential elections in July 2018, President Ibrahim Boubacar Keita and Prime Minister Soumeylou Boubeye Maiga promoted a law that includes the "exoneration of criminal investigations already initiated or planned against individuals who committed or were complicit…in crimes or delicts occurring in the events linked to the crisis started in 2012." Article 15 of the bill expands the exoneration of cases to all persons who disarm within six months of the law's activation. Acknowledging the normative prohibition against amnesties for grave crimes, the text excludes war crimes, crimes against humanity, rape and "all other crime deemed imprescriptible." Wary of criticism that this undermines the government's expressed commitment to accountability, President IBK stated that no one with "blood on their hands" will be amnestied and that the bill "does not constitute an award of impunity, nor does it signal weakness. Even less a denial of victims' rights."[936] This reflects the government's interpretation of the duty to prosecute international crimes as fulfilled by including the perfunctory exclusion of war crimes, crimes against humanity, rape and "all other crimes deemed imprescriptible." Yet, the law is vague by design and leaves ample space for investigations into human rights abuses to be suspended. Most explicitly, the link to the events of the crisis triggered in 2012 is left unspecified. Perhaps more importantly, the scope of this amnesty depends on the criminal charges. Since no charge of war crime or crime against

[933] UN Doc. S/2015/732 (2015).
[934] FIDH and AMDH 2017a, 14.
[935] Amnesty International 2018, 8.
[936] Le Cam 2018.

humanity has yet been successfully tried in a Malian national court, it is clear that the reconciliation law could cover many killings and abuses, and "could exacerbate the sense of impunity around the crimes of Mali's security forces and armed groups."[937] This shows how strategic phrasing can display a government's formal respect for the normative prohibition against amnesties for grave crimes, while effectively amounting to undermining the anti-impunity norm and serving as a resource to further an associational strategy towards opposition groups.

Reflecting how the flexibility with regards to the normative prohibition against amnesties for international crimes can be exploited to reach an agreement, international actors did not express concern with sacrificing justice in the name of peace, sometimes even pressuring Malian government officials to do so. Commenting on this "sensitive question" during the Ouagadougou negotiations, the Burkina Faso Minister of Foreign Affairs and ECOWAS mediator Djibril Bassolé explained, "the government of Mali clearly made us understand that it did not wish to interfere in questions of justice. We understand that but we nevertheless requested everything to be done to appease the tensions and especially for the actors that are the subject of judicial investigations." Asked whether there was an unwritten agreement that stipulated the arrest warrants would not be enforced, Bassolé simply noted, "In any case, we strongly requested the personal intervention of the President of the Republic within this context."[938] During the lead-up to the Ouagadougou negotiations, President of France Hollande and President of Côte d'Ivoire Ouattara personally pressured interim President of Mali Traoré to sign the agreement.[939] Commending the mediation of Burkina Faso, among others, the UN Security Council welcomed the Ouagadougou Accord as a landmark moment and "an important step towards lasting peace and stability in Mali" in the stabilisation of Mali.[940] To be sure, MINUSMA made the inclusion of a prohibition of amnesties for international crimes a condition for the UN's signing of the Algiers agreement.[941] Asked whether the lifting of arrest warrants prompted concern among diplomats, one diplomat who observed in peace negotiations explained, "there wasn't going to be a peace deal if they didn't lift the arrest warrants" and so "the notion of transitional justice was treated lightly. It was more

[937] Lebovich 2018.
[938] Boisbouvier 2013.
[939] RFI 2013c.
[940] UN Doc. SC/110040-AFR/2651 (2013).
[941] Phone Interview with member of the UN mediation team within MINUSMA, 30 August 2018.

of an afterthought."[942] Despite the clear endorsement of impunity, the Ouagadougou and Algiers agreements were "met with applause from European and other capitals."[943] Interestingly, while the ICC's investigation was active during the Ouagadougou and Algiers peace processes, no party raised the threat of ICC prosecution as a serious point of concern.[944] Rather than using the threat of ICC prosecution to pressure armed groups to change their behaviour, the ICC was not even mentioned.

Emblematic Cases of Transactional Impunity

Used as a bargaining chip to help the government in its protracted struggle to boost its legitimacy by re-establishing control over its territory, the way in which the threat of criminal accountability was lifted highlights at least two paradoxical aspects of the Malian peace negotiations. First, and as seen in many other cases, the path to reaching the Algiers Accord, which included a commitment to upholding accountability and a prohibition against amnesty for international crimes, passed through impunity.[945] Second, and more interestingly, the path to reaching an agreement with parties that "commit to rejecting all forms of extremism and terrorism and to not providing any form of material or moral support to terrorist or criminal groups" required providing transactional impunity for individuals who worked closely with such 'terrorist' groups. In other words, tracing the political trajectories of individuals who benefitted from transactional impunity reveals that these individuals had varying degrees of proximity to 'terrorist' groups and Islamist ideology. As previously mentioned, in light of the

[942] Interview with a diplomat based in Bamako between 2014-2017, 4 January 2018.
[943] Chivvis 2016, 148.
[944] Interview with member of the Ministry of Defense, Paris, 25 November 2016; Interview with a diplomat based in Bamako between 2014-2017, 4 January 2018; Phone interview with a Professor of Political Science and a former member of the UN Standby Team as a senior expert on mediation, 7 May 2018; Phone interview with member of the UN mediation team within MINUSMA, 30 August 2018; Phone interview with former Special Advisor to the AU High Representative for Mali and the Sahel, 25 May 2018; Phone Interview with Political Affairs Advisor to the European Union Special Representative to the Sahel, 8 December 2016.
[945] In Article 46, parties to the Algiers agreement committed to, among other measures, the "non-amnesty for perpetrators of war crimes, crimes against humanity, and grave human rights violations, including violence against women, girls, and children, linked to the conflict," the creation of an international commission of inquiry, the operationalisation of the Truth, Justice, and Reconciliation Commission (CVJR), and to profoundly reform the justice sector to "put an end to impunity."

fluidity of shifting allegiances, the more influential factor in determining the parameters of criminal accountability was not simply their political identity as (non-)terrorist but rather their political value and spoiler power.

The aforementioned cases of Alghabass Ag Intalla and Ahmada Ag Bibi, influential Tuareg leaders whose arrest warrants were lifted in October 2013 as part of the Ouagadougou peace process, are emblematic. Ag Intalla is a prominent Tuareg politician, as well as the son of Intalla Ag Attaher, the highly influential hereditary traditional chief of the Tuareg Kel Adagh confederation, and "as such has a certain amount of social standing."[946] As previously mentioned, between 2011 and 2014, Ag Intalla shifted from being an elected representative as a member of the National Assembly, to belonging to the MNLA (a non-Islamist separatist group), to becoming political representative of Ansar Dine (an Islamist group with close connections with AQIM), to creating a dissident group named MIA (the Islamic Movement for Azawad), to joining the HCUA (a new and purportedly separatist and non-Islamist group composed of elements of both MNLA and Ansar Dine), and back to an elected representative.

Similarly, Ahmada Ag Bibi joined Ansar Dine in early 2012, reportedly serving as Iyad Ag Ghaly's deputy and "undoubtedly his most loyal lieutenant,"[947] and later joined the HCUA in 2013. While officially a member of HCUA and a participant in the Ouagadougou negotiations, the intermediary role he played in October 2013 during the negotiations to release several French hostages taken by AQIM demonstrates his continued proximity to terrorist groups. The timing of these hostage negotiations may also be linked to the timing of the lifting of the arrest warrants against Ag Bibi and others involved in the Ouagadougou peace talks. While implicitly agreed to in the Ouagadougou Accord signed in June 2013, the arrest warrants were lifted four months later in October 2013, just a few days before four French hostages held by AQIM were released on 30 October 2013. While unconfirmed, due to the highly sensitive nature of hostage negotiations, media reports suggest that Iyad Ag Ghaly likely used his decades-long experience as an intermediary to AQIM as leverage to negotiate impunity for himself and his associates. Indeed, Ag Ghaly has links to Abdelkrim le Targui, a Tuareg leader of a katiba of AQIM, who held the hostages, as well as HCUA leaders Ahmada Ag Bibi and Alghabass Ag Intalla, both of whom benefited from the lifting of the arrest warrants. However, irrespective of his proximity to terrorist groups like AQIM and Ansar Dine, who were not

[946] Wing 2016, 62.
[947] According to a confidante of Ag Bibi, Bibi "is the voice of Iyad. If you negotiate with him, it's like if you were negotiating with Iyad." Carayol 2014.

allowed to participate in the peace negotiations, Ag Bibi was provided impunity as he was deemed politically valuable. As a presidential advisor noted, "He can play a role to bring his tribe back on the negotiation track."[948] Following the lifting of the arrest warrants against them, both Ahmada Ag Bibi and Alghabass Ag Intalla were elected to the Malian legislature under none other than the Rassemblement pour le Mali (RPM), the party of President Ibrahim Boubacar Keita.

Further, the case of Cheikh Ag Aoussa highlights how other individuals who had been explicitly named in criminal complaints submitted by human rights groups to the Criminal Court of Bamako and had ties to terrorist groups also benefitted from transactional impunity. As mentioned earlier, Ag Aoussa was first part of Ansar Dine in 2012 and later served as military chief of HCUA in 2013. In addition to being reportedly suspected of involvement in the execution of Malian military members in Aguelhok in January 2012, Ag Aoussa was named as one of 15 individuals accused of grave abuses against victims in Timbuktu. Yet, he also served as one of the principal interlocutors with the UN and French forces during their operations in Kidal. Commenting on his political value, one UN official noted, "Despite his toxic aspects, he is too vital to do without him."[949] His arrest warrant was lifted on 15 June 2015, in a prelude to the signing of the Algiers Accord. Expressing frustration at this phenomenon, and referring to Ag Aoussa, Prosecutor General Daniel Tessougué stated, "HCUA, MNLA, Ansar Dine, for us it's the same. The No. 2 of the HCUA was the No. 2 of Ansar Dine before the hostilities. So, try to understand the mutations that can take place, like a gangrene, like a cancer."[950]

Demonstrating the paradoxes of the peace processes in Mali, their trajectories highlight how "many of the actors of peace, who used to be actors of war, are not nice guys. They are even real bad guys capable of supporting terrorist attacks."[951] Yet, despite their affiliations with terrorist groups and their alleged responsibility for human rights abuses, being deemed politically valuable to the restoration of state authority comes with a share of the scarce resources to which the state has unique access, including impunity.[952] This reflects broader clientelist practices, in which valuable leaders who support the government are "brought back"

[948] Carayol 2014.
[949] RFI 2016.
[950] Diawara 2013.
[951] Yabi 2018.
[952] Nouwen 2013a, 371.

through offers of money and other rewards."[953] Needless to say, this "policy of rewarding obstreperous actors in order to push the moment of reckoning forward a little," comes at the expense of holding perpetrators of grave crimes accountable.[954]

Selective Neutralisation

Despite the ambiguity within the agreements and the strategic offers of transactional impunity made to increase the chances that actors reach a peace agreement, this did not rule out the occurrence of four trials that were welcomed as landmark moments in the pursuit of justice in Mali as well as in the evolution of international criminal jurisprudence. Four opposition figures were tried for grave abuses: two trials were held in Mali and two were held at the ICC. Human rights groups welcomed these cases as "a victory for victims" and "considerable advances for the fight against impunity,"[955] yet they also deplored their selectivity, noting these cases "are just the tip of the iceberg."[956] The defendants were among dozens accused of responsibility for grave abuses in criminal complaints submitted by human rights groups and only represented an extremely small portion of all crimes committed by armed groups and government forces since 2012.[957]

By analysing these cases as exceptions within the landscape of impunity, it is clear that the Malian authorities implemented the anti-impunity norm in such a way as to avoid clashing with the political exigencies of the negotiations. As explained below, these individuals were deemed of low political value to the government's legitimation strategy to re-establish control over the territory and thus, their prosecution was deemed not costly and even beneficial. Regarding the peace processes with 'non-terrorist' groups, three of the four trials were of members of Ansar Dine and MUJAO - groups that did not participate in the negotiations. The

[953] ICG 2014a, 23.
[954] McGovern 2013, 45.
[955] FIDH MIDH, and LIDHO 2017b, 5.
[956] A member of a prominent Malian human rights organisation stated, "It's smoke and mirrors. The case of Ahmad Al Faqi [Al Mahdi] is only the visible tip of the iceberg." Dembele 2016.
[957] On 12 November 2014, human rights organised filed a complaint with the Tribunal de Grande Instance of Commune III of Bamako for crimes against humanity and war crimes on behalf of 80 women and girls who were victims of sexual violence. On 6 March 2015, the same group filed a new complaint on behalf of 33 victims for alleged crimes committed in Timbuktu, targeting fifteen alleged perpetrators of crimes against humanity and war crimes. FIDH and AMDH 2014b; FIDH and AMDH 2015.

defendants were all Malian Tuaregs who were recruited from the local population by the leaders of Ansar Dine, MUJAO, and AQIM to administer institutions to impose their harsh views on the population. Yet, reflecting the fluidity between 'non-terrorist' and 'terrorist' groups, their superiors and counterparts in these 'terrorist' groups were spared prosecution, as they had positioned themselves as valuable to the political process. As illustrated below, this selective neutralisation through law, to weaken some while empowering others, was achieved by exploiting the centrality of executive power in the national administration of justice as well as the state's primacy in the ICC system, by adopting an interpretation of complementarity that favoured transferring cases to the ICC rather than trying them domestically.

Aliou Mahamane Touré

The trial of Aliou Mahamane Touré, known as the "hand chopper of Gao," marked not only the first national trial regarding abuses against civilian population committed during the occupation by terrorist groups but also the first time Malian courts grappled with the charge of war crimes. As MUJAO's Chief of Islamic Police, he was responsible for carrying out the sentences of the Islamic court "by inflicting heinous abuses ranging from whipping, illegal arrest and detention, assault, inhumane treatment, and amputating limbs of convicted persons."[958] He was arrested by Malian forces on 23 December 2013 and, after three years of investigations, was found guilty on 18 August 2017 and was handed a ten-year sentence. The trial and verdict were welcomed as "an undeniable breakthrough that sent a powerful message to the victims of the serious violations that he orchestrated," especially in light of the "zeal" with which he carried out his crimes.[959]

While Touré was prosecuted, his superior in the Islamic Police during the occupation in Gao was not. Yoro Ould Dah, a member of MUJAO who belongs to the Arab community and who was well known for his alleged criminality and also named in the same criminal complaint for abuses committed in Gao, was arrested on 30 July 2014 by French forces who suspected him of involvement in an attack against a French soldier. After being transferred to Bamako, Ould Dah was released several days later in August 2014 by Malian authorities as part of the peace process. Crucially, four months prior to his release, Ould Dah had joined the

[958] FIDH MIDH, and LIDHO 2017b, 14.
[959] FIDH MIDH, and LIDHO 2017b, 14.

MAA, an armed group participating in the Algiers peace process.[960] He then served as a "key player in the military structure" of the MAA and later led the Platform forces, the pro-governmental coalition of armed groups, through which he worked with MINUSMA and other foreign forces.[961] Alluding to his newfound political identity, Ould Dah stated, "Everyone makes mistakes. Me too. Now, I've joined the MAA four months ago. I am not a terrorist."[962] Despite his previous role as leader of the Islamic Police for which his subordinates and counterparts have been prosecuted, Yoro Ould Dah's transfer to a leadership position in a government-aligned coalition of armed groups that participated in the peace negotiations increased his political value. Thus, while the costs of trying Ould Dah were deemed too high, the cost of trying Touré were deemed 'affordable.' Touré raised this during his trial, accusing the judicial system of bias as he was the only person prosecuted for crimes committed in Gao.[963] While Touré had indeed been one of nearly 30 individuals targeted by arrest warrants in February 2013, he was not a political heavy-weight. This is evidenced as well by the lack of contestation regarding Touré's arrest and trial. Asked whether any groups participating in the peace negotiations requested, either officially or unofficially, Touré's release, several participants and observers confirmed this was not an issue.[964]

The trial of Mahamane Touré was nevertheless a milestone in the domestic treatment of international crimes. Indeed, a fascinating back-and-forth occurred between the investigating judge, lawyers for the civil parties, the Office of the Public Prosecutor, and the judges of the Criminal Court of Bamako (Tribunal de Grande Instance of Bamako) regarding the charge of war crime – defined in Article 8 of the Rome Statute and in Article 31 of the Malian Criminal Code. The investigating judge found the charges of war crimes and torture, as well as attacks on the internal and external security of the state, criminal conspiracy, aggravated assault, terrorism, and illegal possession of military weapons and ammunition, to be sufficiently established and referred the case to the Public Prosecutor. This marked the first time that charges of war crimes and torture had been accepted by an investigating judge. However, the charges of war crimes and torture were dismissed by the Pre-Trial Chamber upon

[960] Thienot 2014.
[961] Boutellis and Zahar 2017, 20; RFI 2015.
[962] Okello 2018.
[963] FIDH MIDH, and LIDHO 2017b, 16.
[964] Phone interview with a Professor of Political Science and a former member of the UN Standby Team as a senior expert on mediation, 7 May 2018; Phone interview with member of the UN mediation team within MINUSMA, 30 August 2018; Phone interview with former Special Advisor to the AU High Representative for Mali and the Sahel, 25 May 2018.

the request of the Public Prosecutor who argued that "since Mali never declared war, it might seem a bit superfluous to contemplate war crimes."[965] At the trial, lawyers for the civil parties asked for the charges of "aggravated assault" to be reclassified as "war crimes", arguing that such a reclassification better reflects the reality of the serious abuses committed against civilians and that a declaration of war does not need to have been issued as long as the crimes took place during an armed conflict. The Public Prosecutor then changed position and supported the civil parties' request for reclassification, explaining that it "had not correctly grasped the concept of war crimes and the importance of accepting this charge in this case."[966] Ultimately, the judges found Touré guilty of various crimes (attacks on the internal security of the State, criminal conspiracy, possession of military weapons, and aggravated assault with mitigating circumstances) but rejected the classification of war crimes, finding it "inapplicable."[967] Though no reason was given, the lawyers for civil parties suggest it may be due to "poor understanding by the Malian judges of international crimes, even though international crimes were added to the criminal code in 2001."[968]

Al Mahdi and Al Hassan

The two other emblematic cases were of Touré's counterparts in Timbuktu. Ahmad Al Faqi Al Mahdi was a member of Ansar Dine and served as the head of the morality brigade, known as the Hesbah. Al Mahdi was arrested in October 2014 by Operation Barkhane and detained in Niger. With Mali's cooperation, Niger transferred him to the ICC on 26 September 2015 following an arrest warrant issued for him on 18 September 2015. After pleading guilty, he was convicted as a co-perpetrator for the war crime of intentionally directing attacks against historic monuments and buildings dedicated to religion, including nine mausoleums and one mosque in Timbuktu, carried out between June and July 2012.[969] His conviction marked the first time the ICC tried the war crime of destroying historical and religious monuments and was widely welcomed as a major step for international criminal legal jurisprudence.

[965] FIDH MIDH, and LIDHO 2017b, 18.
[966] FIDH MIDH, and LIDHO 2017b, 18.
[967] FIDH MIDH, and LIDHO 2017b, 19.
[968] FIDH MIDH, and LIDHO 2017b, 19.
[969] Judgment Al Mahdi.

Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud, henceforth 'Al Hassan,' was also a member of Ansar Dine and served as de facto chief of the Islamic Police. Al Hassan was arrested by Operation Barkhane and transferred on 31 March 2018 to the ICC, following an arrest warrant issued on 27 March 2018. He was accused of participating in the destruction of mausoleums in Timbuktu and in the policy of forced marriages "which victimized the female inhabitants of Timbuktu and led to repeated rapes and sexual enslavement of women and girls."[970] As of August 2018, the charges for the five charges of war crimes and four charges of crimes against humanity were yet to be confirmed. Like Touré, both Al Mahdi and Al Hassan were named in a criminal complaint lodged by human rights group in Malian courts. An investigation had been opened by an investigating judge, though the proceedings had stalled.[971]

By examining the context surrounding their transfers to The Hague, this section shows how complying with the Rome Statute's legal requirements can complement, rather than obstruct, the government's legitimation strategy. The Malian government's decision to transfer them to The Hague not only fulfilled the government's requirement to cooperate with the ICC but also satisfied the admissibility test, set by the Rome Statute's complementarity regime. As a reminder, a case may been deemed admissible if the State that has jurisdiction over the case is unable or unwilling genuinely to carry out the investigation or prosecution of the case domestically. Mali demonstrated its unwillingness to prosecute them domestically and established the cases' admissibility. Exploring this compliance in more detail illustrates how the government capitalised on the state's primacy in the ICC system to implement the anti-impunity norm to its advantage, and thus in line with its cost-benefit analysis, by only prosecuting individuals with low perceived political value whose trial would not jeopardize peace negotiations. Simultaneously, it externalised to The Hague any cost that would come from trying them domestically.

Mali arguably cleared the barriers to their trials in The Hague not because it was *unable* to try them domestically due to the insecurity or *unwilling* because their political status would complicate an already volatile political situation, but rather because their trial would *not* endanger the broader peace process and the government's goal of re-establishing control over its territory. First, the Malian government was arguably not necessarily unable to try Al Mahdi and Al Hassan. According to Article 17(3) of the Rome Statute, "in order to determine inability

[970] Al Hassan - Case Information Sheet.
[971] FIDH and AMDH 2018.

in a particular case, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings." It should of course be acknowledged that the context of insecurity presents huge challenges to the Malian judiciary. For instance, as of September 2017, "only 30% of all agents of the State in the septentrional and Mopti regions were on the job."[972] The impact of the occupation on the administration of justice in northern Mali prompted the Supreme Court, on 16 July 2012[973] and 21 January 2013,[974] to transfer the jurisdiction of courts in the north to the Criminal Court of Commune III of the District of Bamako.

However, as evidenced by the successful trial of Aliou Mahamane Touré, conducted in a manner that was deemed to uphold fair trial standards, these challenges are not categorically insurmountable. According to human rights organisations, "the Malian political and judicial system thereby showed that they were now willing and able to prosecute the perpetrators of the most serious crimes committed during the conflict."[975] First, in terms of jurisdiction, the jurisdiction of courts in the north was re-transferred on 16 February 2015, as the Supreme Court argued "the areas formerly occupied have been liberated and the sovereign functions of the State can once again be carried out more or less normally, with the gradual return of the agents of the State."[976] Also, importantly, both Al Mahdi and Al Hassan had already been detained, making their apprehension for trial feasible. Moreover, as explained further in Chapter 8, the strength of the publicly available evidence against Al Mahdi, including video and audio recordings as well as satellite imagery, made a national trial increased the feasibility of holding his trial in Mali.[977] According to a lawyer for civil parties, "It was the easiest one. The images were streaming. He harangued the crowds. His speeches were translated. There was no way

[972] UN Doc. S/2017/811 (2017). According to human rights groups, "The courts of the Timbuktu and Gao regions that were rehabilitated after the occupation are barely functional and cannot, due to the security situation and threats faced by the administrators of justice, handle cases that investigate individuals who are or have been affiliated with armed groups and terrorist groups, some of whom have benefited from the confidence-building measures provided for in the peace agreement." FIDH MIDH, and LIDHO 2017b, 9.
[973] Supreme Court Decision N°46 of 16 July 2012.
[974] Supreme Court Decision N°04 of 21 January 2013.
[975] FIDH MIDH, and LIDHO 2017b, 16. It should be noted that the justice sector provided no budget for victims to participate in the trial. To compensate, human rights groups facilitated victims' participation, including organising their travel by plane from Gao to Bamako, explaining the proceedings and preparing them for their testimony on the stand.
[976] Supreme Court Decision N°11 of 16 February 2015.
[977] Rosenberg 2016b.

out."[978] Asked whether the Al Mahdi and Al Hassan trials could have been conducted in Mali, from a practical perspective, a Malian scholar-practitioner with extensive experience in human rights protection explained, "There are no major obstacles – it would be possible."[979] Moreover, according to the timeline of the proceedings, a trial of Al Hassan could have been held domestically, as Touré's trial was held on 18 August 2017 - before Al Hassan's transfer to the ICC.

Rather, the Malian government was unwilling - or more precisely uninterested - in prosecuting Al Mahdi and Al Hassan. As illustrated below, Al Mahdi and Al Hassan were arguably transferred to the ICC because they were *not* politically valuable to the peace negotiations. Put differently, other individuals who were accused of similar criminal conduct committed in Timbuktu were nevertheless released, as they were deemed valuable to political reconciliation in light of their spoiler power. In contrast, the costs of transferring Al Mahdi and Al Hassan to the ICC were low. Equally, the benefits of trying them domestically were not high enough.

The most controversial case is that of Ag Alfousseyni Houka Houka. A member of Ansar Dine, Houka Houka served as the judge of the Islamic Tribunal in Timbuktu during the ten-month jihadist occupation, issuing sentences for amputations, stonings, floggings, and arbitrary arrests, among other punishments. A proceeding was opened by the Public Prosecutor against Houka Houka, who was later arrested by the Malian army in January 2014 in light of these allegations. According to the colonel who led the operation, "there are youths here whose arms Houka Houka amputated; he issued forced divorces. He also possessed weapons of war." According to a resident of Timbuktu, "the arrest of Houka Houka is a big day. In the streets, everyone is expressing their joy."[980]

However, capitalising on the executive authorities' ability to undermine ongoing judicial proceedings, Malian authorities released Houka Houka on 15 August 2014, prompting outrage among civil society and UN human rights monitors. According to the UN Independent Expert on Human Rights in Mali, his release "occurred at the same time as the competent investigating judges were holding the first round of hearings for a group of victims of international crimes" committed in northern Mali, accompanied by human rights

[978] Phone interview with Malian human rights lawyer, 2 February 2017.
[979] Phone interview with Professor of Law, former Chargé de Mission at the Ministry of Justice of Mali, and former Chief of Staff to the Prime Minister Modibo Keita, 28 June 2018.
[980] Studio Tamani 2014.

organisations.[981] The Malian authorities' parallel decisions to release Houka Houka and transfer Al Mahdi and Al Hassan to the ICC are noteworthy, as Houka Houka worked closely with both Al Mahdi and Al Hassan. As leaders of the morality brigade and Islamic Police, both Al Mahdi and Al Hassan implemented the decisions taken by Houka Houka, the judge of the Islamic tribunal. The ICC Prosecutor highlighted this collaboration during the Al Mahdi trial's opening hearing.

> Al Mahdi went to the meeting in question in the company of Houka Houka, the future judge of the Islamic tribunal… In addition to Hisbah, Mr Al Mahdi was also involved in the work of the Islamic tribunal in Timbuktu as demonstrated in his statements and the documentary evidence and videos. On one of the videos Mr Al Mahdi is sitting to the right of Judge Houka Houka and has a discussion with him during the hearing. Furthermore, Al Mahdi actively participated in the execution of the decisions of the tribunal. When it came to public flagellation, for example, he explained the sentence using a loudspeaker before hundreds of people gathered and mentioned the importance of the armed groups. And you can see that on the excerpt from France 2, which I mentioned a short while ago where you can see Mr Al Mahdi using a loudspeaker to speak to the crowd and explain what the sentence of the Islamic tribunal of Timbuktu had been.[982]

Though he was not an official representative of any armed group that officially participated in the Ouagadougou or Algiers peace processes, his status within the patronage bazaar of the Malian politico-military context evidently affords him political leverage. He now lives freely around Timbuktu and reportedly serves as an intermediary between the government and certain armed groups.[984] According to a lawyer working on behalf of the civil parties, frustrated with the lack of political will, "Houka Houka is even asking for his reintegration into the civil service. Requesting his salary in arrears. The state is doing absolutely nothing…There is no will."[985] Commenting on Houka Houka's release, the UN Independent Expert on Human Rights declared that the "confidence-building measures set out in article 18 of the Ouagadougou Preliminary Agreement are no justification for the politically-motivated release of alleged perpetrators of serious human rights violations. Such action is contrary to the

[981] Human Rights Council 2015, 10; FIDH and AMDH 2014a.
[982] Transcript of Al Mahdi Hearing, 32 -33.

[984] RFI 2018.
[985] Phone interview with Malian human rights lawyer, 2 February 2017.

international obligations of Mali and undermines the principle of the separation of powers enshrined in article 81 of the Malian Constitution of 25 February 1992."[986] Responding to protests, the Minister of Justice Bathily did not even seek to portray the release as compliant with anti-impunity, as in other cases. More candidly, he explained, "Today, [Houka Houka] is revealing things that we are interested in knowing."[987]

In contrast, Al Mahdi and Al Hassan had lower political value to the Malian government's strategy. Though Al Mahdi was named in a criminal complaint for human rights abuses submitted to the Court of First Instance of Commune III, Mali did not issue any extradition request for Al Mahdi following his arrest in October 2014 in Niger, where he was charged in an unrelated case for arms trafficking with the intent of committing acts of terror. Similarly, while Al Hassan was named in the same criminal complaint in Mali, the proceedings had stagnated. After he was detained by Operation Barkhane, no action was taken to prosecute him domestically. According to an international advisor to the peace negotiations, participants in the peace process did not raise concerns regarding Al Mahdi's transfer and trial.[988] According to the former Special Advisor to the AU High Representative for Mali and the Sahel, "I can't remember any official reaction by an armed group because he was not considered an official member of those who were negotiating."[989] Indeed, despite the fluid links between AQIM and signatory groups, Al Mahdi's trial was not a point of contention.

In sum, the Mali situation continues the trend seen in other self-referral cases, in which the government interprets complementarity in a way that is advantageous to its broader political objectives. However, unlike in other cases, in which governments agreed to transfer cases to the ICC that were deemed too politically difficult to handle on the national level in light of the clout of the defendants, Al Mahdi and Al Hassan were transferred not because their prosecutions would be costly because they represented a political obstacle for the Malian

[986] Human Rights Council 2015.
[987] Dicko 2014.
[988] Phone interview with a Professor of Political Science and a former member of the UN Standby Team as a senior expert on mediation, 7 May 2018. Exceptionally, in January 2016, the Sahara Emirate, an offshoot of AQIM, released a video calling for the release of Al Mahdi and other individuals detained in Mali, in exchange for a Swiss hostage held by AQIM. The video notes "a Muslim is the brother of another Muslim, he does not oppress him and does not denounce him." The message could be read as either a sign of solidarity or a cautionary threat to Al Mahdi. Maupas 2016.
[989] Phone Interview with former Special Advisor to the African Union High Representative to Mali and the Sahel, 25 May 2018.

government's strategy during the crisis, but precisely because they were politically insignificant to the peace talks. In this sense, the authorities' outsourcing of the 'easy' cases simultaneously undermines one version the anti-impunity norm, the imperative for states to hold individuals accountable for abuses domestically, while fulfilling another version of the norm, that states do not need to hold individuals accountable in domestic courts but cooperate in legal proceedings in international courts. This illustrates how the inherent vagueness of the norm enables actors to advance their strategic objectives by deploying different versions of the norm. Assessing whether this proximity between the ICC's prosecutorial strategies and state's political interests in pursuing selective justice is normatively desirable or objectionable, however, is discussed further in Chapter 8.

Amadou Haya Sanogo

The fourth case of human rights abuses that has been tried since 2012 concerns the crisis within Bamako. The domestic trial of Amadou Haya Sanogo, the leader of the March 2012 coup against then President Amadou Toumani Touré, for the disappearance and execution of Red Berets soldiers marked the first time such a politically important figure was held accountable for human rights abuses. After investigations and the discovery of a mass grave, judge Yaya Karembé charged Sanogo in late November 2013 for "killings, murders, and complicity in killings and murders."

The political context at the time of the discovery of the grave is, of course, also relevant in understanding the arrest of such a powerful figure. At the time of his arrest, Sanogo's value to the government had significantly weakened, as the transitional government had been replaced by an elected president, Ibrahim Boubacar Keita (IBK) in August 2013. This is not to argue that the government would not have allowed for Sanogo's arrest had robust evidence against him emerged at an earlier date. However, it is important to note that Sanogo's prosecution fit with two objectives of IBK's new government. First, Sanogo's arrest allowed IBK to display his commitment to the anti-impunity norm and to the rule of law more broadly. In December 2013, he stated, "There will be no impunity. Impunity – zero tolerance. Everyone will have to answer to the law. You have followed a recent case of a certain officer who

believed he was above the law. He is now in prison, meditating on his miscalculation."[990] Second, Sanogo's neutralisation fit within IBK's objective of reducing the influence of the former junta and consolidating his authority over the military hierarchy.[991] In October 2013, due to rival groups clashing within the military, Operation Saniya resulted in the arrest of several members of the former junta. Additionally, in November 2013, the Council of Ministers dissolved the military committee for the monitoring of defence and security forces reform, led by Sanogo.[992]

Over the next five years, however, the political will to prosecute Sanogo became more ambivalent. For instance, in August 2016, the Malian cabinet transferred judge Karembé, who was leading the case against Sanogo, to a diplomatic post at the Malian embassy in Khartoum, Sudan. This was interpreted by many observers as a move to neutralise him by way of promotion.[993] Also, while human rights organisations welcomed the quality and independence of the investigation, which "attests to the genuine political will on their part" despite the sensitivity of the case, "owing to the position of power that Sanogo and his accomplices held," the opening of the trial was only held at the very end of the statutory three-year pre-trial detention limit. According to an observer who met with judicial officials prior to the opening of the trial, the officials did not seem aware of the impending deadline.[994] To comply with the statutory limits, the trial's opening was rapidly organised within two weeks of this meeting and was hailed as a crucial step in the fight against impunity in Mali.

However, successive procedural delays have significantly slowed its progress. Several observers noted that the government's political will to prosecute Sanogo has waned, in light of the need to placate his supporters within the military ahead of the 2018 presidential elections as well as concerns around potential revelations regarding the collaboration between Sanogo and President IBK.[995] According to a diplomat familiar with the case, "there is no interest from the government. The government did not tell us this directly, but Sanogo has a lot of supporters in the military ranks. It would be costly for the government to do anything against him,

[990] Keita 2013. Displaying the government's political will to prosecute Sanogo, the Minister of Justice himself accompanied judge Karembé to the site of the mass grave.
[991] ICG 2014a, 6.
[992] Communiqué of the Council of Ministers of Mali, 8 November 2013.
[993] Phone interview with researcher from a human rights organisation, 5 April 2018.
[994] Confidential interview, February 2017.
[995] Confidential interview, November 2016.

especially with the presidential elections coming up."[996] For instance, in February 2018, one of the accused, Ibrahim Dahirou Dembélé, who was former Commander in Chief of the Armed Forces at the time of the Red Berets case, was promoted to the prominent position of Inspector General of the army. To comply with this decision, the judges of the trial chamber granted interim release. Dembélé was later appointed as Minister of Defense, prompting strong criticism from the victims' groups.[997] This situation illustrates the importance of taking into account the authorities' central role in enforcing the anti-impunity norm at a domestic level, as elite political will is crucial in enabling the holding of such a politically-sensitive trial, which would require, for instance, the need to authorise a budget and to arrange for security measures during the trial. While the trial is ongoing, an analysis of the evolution of the case suggests that political will existed for the detention of Sanogo, in order to neutralise his kinetic influence, though later likely waned with regards to his actual prosecution, likely in part due to Sanogo's status and support within the military.

Conclusion

In similar ways as in the first phase of the Malian conflict explored in the previous chapter, using the norm's functions helped the authorities shape parties' reputations as well as the relative power of the government and its opposition, thereby including and empowering certain actors while excluding and neutralising others. Drawing upon the norm's narrative-shaping function and branding effect helped privilege some interlocutors as legitimate and villainise others as illegitimate, by creating a contrived difference between 'non-criminal non-terrorist groups' and 'criminal terrorist groups.' In terms of optimising the government's ability to exercise control over the territory, criminal accountability was selectively enforced and suspended as a means of coercive leverage and selective neutralisation to increase the prospects of reaching a political settlement that would enable the government to enhance its effective control throughout Mali. In light of the extremely sparse landscape of accountability for the widespread abuses committed in Mali, it is clear that being held accountable was not simply a function of having committed abuses. Rather, it was also shaped by the perceived political value and spoiler power held by key interlocutors, and thus the government's cost-benefit analysis of whether supporting prosecutions would jeopardise its strategy to extend its power

[996] Interview with a diplomat based in Bamako 2014-2017, 4 January 2018.
[997] RFI 2019.

throughout the territory. In light of the fungibility of individuals, this paradoxically entailed suspending the threat of justice against individuals linked to 'terrorist' groups. This was achieved by in part capitalising on the executive power's influence over the national administration of justice, leading to measures that undermined the government's commitment to the anti-impunity norm. Indeed, despite the active ICC investigation and the consensus against amnesties for grave abuses, Malian authorities, with the tacit support of international mediators, still used the promise of impunity as a bargaining chip in order to incentivise certain groups to sign peace agreements. It was also achieved by complying with Mali's duty to cooperate with the ICC's investigations against individuals who were deemed not politically valuable to the negotiations.

As in Côte d'Ivoire, the particular way justice was pursued undermines the government's full commitment to anti-impunity more generally. The parameters of accountability and impunity were drawn in a way that responded to the political exigencies of the conflict, prompting Malians on all sides of the conflict to "complain of impunity, of no accountability for the crimes of individuals, groups, or the state, especially because armed group leaders, rather than being punished, have essentially been rewarded."[998] Feelings of injustice have contributed to grievances and mobilisation against the state, including through terrorist groups. As Holder explains, justice, "which has been sorely lacking, will be the fundamental issue in not only national reconciliation, but also the reconstruction of the State."[999] From this longer-term perspective, actors adopted an approach that prioritised the restoration of stability in the face of transnational terrorism, but that does not aim to "meet a desire for genuine change that runs deep" among Malians nor to lay the foundations for more sustainable state.[1000] This has caused some Malians to interpret political reconciliation as impunity.

[998] Pezard and Shurkin 2015, xv.
[999] Ploquin 2016; Lebovich 2018; Yabi 2018.
[1000] ICG 2015; Bratton, Coulibaly and Dulani 2013.

Chapter 8: The Anti-Impunity Norm in Conflict

The rise of the anti-impunity norm represents a remarkable change in the international constitutional order, one that has indeed changed the way elite political actors act within this new normative environment of the "age of accountability." The role of scholarship in this field is to understand how and why politics have changed in response to this new norm. The concept of norm exploitation helps explain how and why actors can use the norm to pursue certain objectives. It shows how elites capitalised on the norm's inherent ambiguity regarding whether states have a duty to prosecute grave abuses, the centrality of the state within the norm's enforcement and the limits of judicial independence nationally, and the overlap between the norm's functions and criteria of government legitimacy. It shows how elite actors set the parameters of accountability and impunity in light of their objectives within the political bargaining processes, and in order to boost their legitimation by shaping parties' reputations and ability to exercise effective control over territory, rather than simply as a function of having internalized the 'oughtness' of the anti-impunity norm through international and domestic pressure by pro-human rights groups. In this sense, the normative commitment to the imperative to hold individuals accountable for grave abuses expressed by elites and displayed through certain measures was not strong enough to convince actors to pay the high costs of doing so when it would complicate strategic interests.

In terms of overall findings, this thesis thus joins others in demonstrating how the priority placed on domestic security imperatives means pressure for impunity supersedes the pursuit of justice for grave abuses and that the patterns of justice "follow the logic of political coalitions and interests more than it leads them."[1001] It echoes the findings of studies that examine the use of the anti-impunity norm not simply in terms of accountability but rather from a political bargaining perspective and reveal how, through domestic accountability measures that are not wholly effective and independent as well as by complying with their obligations towards international courts, the selective pursuit of justice can become part of actors' strategies to shape the balance of power in conflicts.[1002]

[1001] Bass 2016; Snyder and Vinjamuri 2004, 43.
[1002] Bell 2017; Lake 2017; Cronin-Furman 2015; Loken, Lake, and Cronin-Furman 2018; Subotić 2009.

This chapter first presents a table that shows the cross-cutting relationships between elite strategy and accountability measures and then, recapitulating the four previous chapters, it then shows how these relationships played out in practice in Côte d'Ivoire and Mali. It then summarises the main findings drawn from these cases, highlighting the limits of the internalization of the anti-impunity norm in light of the bargaining around accountability, and situates these findings within the pool of studies on the strategic use of anti-impunity measures. Further, it explains more specifically why the ICC's prosecutorial decisions ultimately complemented elite strategy and considers what this means normatively for international criminal justice. Finally, the chapter concludes by drawing together this dissertation's original contributions and suggests paths for future research.

Relationships between Elite Strategy and Accountability

The table below captures the relationships that explain how actors use the anti-impunity norm to shape the political landscape in ways that reflect, but also determine, the balance of power within the country. It helps untangle the puzzle of why elites discursively embrace the anti-impunity norm despite the risks in doing so and highlights the need to scrutinize the underlying dynamics that motivate elites' approach toward anti-impunity measures. While the case studies delved more fully into how actors exploited the norm's features and functions, this table recapitulates the findings by zeroing in on how actors supported or obstructed accountability measures in order to shape one key criteria of legitimacy: its ability to exercise effective control. The table below shows how elite actors did so to pursue at least five aims: to incentivise individuals to cede power, to incentivise individuals to join negotiations and accept a political settlement, to ensure the loyalty of individuals, to neutralise opponents, and to dispel attention from other alleged perpetrators.

Table 3: Relationships Between Elite Strategy and Accountability Measures

Individual's Perceived Political Value		Exclusionary Approach (when elite actors want to exclude the individual from future political arrangements)	Associational Approach (when elite actors want to include the individual from future political arrangements)
HIGH	Elite actors *block* accountability measures against individuals who are deemed of high political value	- To incentivise challengers to cede power	- To incentivise challengers to join the negotiation table - To incentivise challengers to accept a negotiated settlement - To incentivise challengers to participate in a political arrangement - To protect loyalties within ranks
LOW	Elite actors *implement* accountability measures against individuals who are deemed of low political value	- To neutralise challengers	- To deflect attention away from higher-value individuals also accused of abuses

The first column, the target individual's perceived political value, reflects the importance of taking into account the perception of elite actors regarding the role the target individual plays within the conflict-affected context. This applies to individual targets who are not only in the opposition but also within the state's political and military ranks. As explained in Chapter 3, an individual can be deemed of high political value, meaning they are deemed to play a crucial role in the present or future political arrangement. This can be due to their strong spoiler power since, as Hayner notes, "those who control the levers of war have to be included, or any peace effort will fail."[1003] At the same time, having high political value is not inherently a reflection of strong spoiler power in terms of the individual's potential to cause violence. Rather, an individual may have high perceived political value despite having very little ability to inflict harm. This can be the case, for instance, in post-conflict democracies where opposition parties are encouraged to emerge in order to hold legitimate elections. An individual can also have low perceived political value, meaning elite actors do not see them as having a crucial role in the present or future political arrangement. These individuals can have strong spoiler power or low spoiler power. In other words, as illustrated in the case studies below, an individual's perceived political value (high/low) is not necessarily strictly linked to their power to spoil and disrupt the political context (strong/weak). Considering the political profile of the individuals that are accused of grave abuses is rare and adds a valuable angle to the approach adopted by most cross-case studies, which tend to focus not on *who* is targeted but instead on other factors, such as the type of conflict outcome (one-sided victory vs. negotiated settlement), the type of trial (national security trial, national human rights trial, international human rights trial), or the status of Rome Statute ratification.[1004]

The second column describes the elite actors' posture towards accountability measures: block or implement. In supporting accountability mechanisms, elite actors capitalised on the state's centrality of the norm's enforcement and the inherent ambiguity within the norm itself regarding states' duty to prosecute grave abuses or outsourcing to the ICC. In obstructing accountability mechanisms, elite actors capitalised on the state's centrality of the norm's enforcement and the limits of judicial independence within the domestic institutional framework. The third and fourth columns reflect the importance of taking into account elite's approach towards given individuals. An exclusionary approach refers to cases in which elite

[1003] Hayner 2018.
[1004] Dancy and Wiebelhaus-Brahm 2018; Meernik, Nichols, and King 2010; Simmons and Danner 2010.

actors want to exclude the individual from future political arrangements. An associational approach refers to cases in which elite actors want to include the individual from future political arrangements. Importantly, an exclusionary approach does not necessarily refer to a situation of one-sided victory and the associational approach does not necessarily refer to a situation of negotiated settlement. Rather, in both types of conflict, elite actors seek to include and exclude various interlocutors for different reasons. Indeed, it depends on the opportunities to further the government's strategic interests that are generated by excluding or including a particular interlocutor that is allegedly responsible for grave abuses. Supporting and obstructing accountability measures can further both exclusionary and associational approaches in different ways.

The cross-cutting relationships illustrated in the chart leads one to expect the following situations. In an exclusionary approach, if elite actors wish to exclude a given challenger who has high perceived political value, they will likely block accountability measures, such as by offering amnesties, releasing detainees, blocking judicial processes, and refusing to cooperate with the ICC. The aim is likely to incentivise the challenger to cede power. If elite actors wish to exclude a given challenger who has low perceived political value, they will like cooperate and support accountability measures, such as issuing arrest warrants conducting national trials, and cooperating with ICC arrest warrants. In an associational approach, if elite actors wish to include a given challenger who has high perceived political value, they will likely block accountability measures, such as by offering amnesties, releasing detainees, blocking judicial processes, and refusing to cooperate with the ICC. This could be done for several aims, including incentivising challengers to join the negotiation table, incentivising challengers to accept a political settlement, incentivise challengers to join a given political arrangement, and to protect the loyalties of a given individual. The lower-right hand case is slightly distinct. If elite actors wish to include a given challenger, they will likely cooperate with, or at least not block, accountability measures against individuals with low perceived political value. The aim may be to deflect attention from other, more politically valuable, targets. The section below recapitulates the findings from the previous chapters and illustrates how these dynamics play out in practice in both Côte d'Ivoire and Mali.

Côte d'Ivoire

Since the beginning of the post-electoral crisis in November 2010, the Ouattara government approached the idea of accountability as a source of coercive leverage and a means of selective neutralisation. Elite actors adopted an exclusionary approach towards Gbagbo, as they viewed Ouattara's ability to exercise effective control over the territory as dependent on excluding Gbagbo from present and future political arrangement. Yet, throughout most of the crisis, Gbagbo was deemed to have high perceived political value to the peaceful resolution to the crisis, mostly due to his strong spoiler power. As explained in Chapter 4, Gbagbo maintained control over the administrative and military apparatus and held the upper hand in the balance of power against Ouattara's 'hotel government.' Accordingly, while the threat of prosecution was made regularly, elite actors consistently made broad amnesty and 'golden exit' offers to Gbagbo. Even in mid-March 2011, after three of the four events that would form the basis for charges of crimes against humanity at the ICC, Gbagbo was offered general amnesty to incentivise him to step down.

By the end of March 2011, Gbagbo's perceived political value to the peaceful resolution of the conflict diminished, due to his intransigence despite successive mediation attempts as well as the increase in abuses allegedly carried out by his security services. While he still maintained strong spoiler power in light of the continued allegiance of key parts of the security services, Gbagbo's perceived political value lowered. As a result, invoking the duty to respond and prosecute helped convince UN Security Council members that even Gbagbo's semi-legal government should no longer be considered legitimate if it uses heavy weaponry against its own people.[1005] The imperative to respond and prevent further abuses was used as a resource to mobilise support for neutralising Gbagbo through military means, as the documentation of particularly egregious abuses "provoke[d] the actual use of military force" and generated support within the UN Security Council to respond to grave abuses through forceful intervention.[1006] In parallel, the Ouattara administration increased efforts to facilitate the opening of an ICC investigation. Shortly after the military operations that led to Gbagbo's

[1005] For instance, Ambassador of France Simon noted that the reference to the 'Responsibility to Protect' doctrine used in UN SC Resolution 1973 adopted on 17 March 2011 to mobilise support for intervention in Libya could serve a similar function in Côte d'Ivoire. "We immediately saw what could be drawn from this decision, which had to establish jurisprudence." Simon 2016, 312.
[1006] Walling 2013, 252-253.

capture in April 2011, the ICC Prosecutor opened an investigation and issued an arrest warrant for Gbagbo.

As covered in Chapter 5, these cross-cutting relationships continue to explain the dynamics of accountability following the end of the post-electoral crisis in April 2011. Having lost their perceived political value, and in light of their continued support among half of the population, Gbagbo was detained along with his entourage, reflecting the Ouattara administration's continued exclusionary approach to Gbagbo. Tracing the decision-making around the arrest warrants issued by the ICC against Laurent Gbagbo, Charles Blé Goudé, and Simone Gbagbo reveals how the complementarity regime was interpreted as a burden-sharing strategy by transferring individuals whose domestic trials would be very costly. In light of Laurent Gbagbo and Charles Blé Goudé's low perceived political value to the future Ivorian political arrangement of Côte d'Ivoire, and their strong spoiler power, the Ouattara administration agreed to transfer these two accused as trying them domestically was deemed too costly. Yet, they declined to transfer Simone Gbagbo and instead decided to conduct legal proceedings domestically. As explained in Chapter 5, in light of Simone Gbagbo's lower spoiler power, and low perceived political value, a domestic trial against her was deemed less costly than one against Laurent Gbagbo and Charles Blé Goudé. Her national trial also entailed some advantages for the Ouattara administration.

As the state's primacy in the Rome Statute system enables it to determine its (un)willingness and (in)ability to prosecute, Ivorian authorities pursued a rather inconsistent approach but one that was in line with their duties under the Rome Statute. The ability of Ivorian authorities to claim they were able and willing to try Simone Gbagbo domestically but unable and unwilling to try Charles Blé Goudé domestically highlights how the state's margin for manoeuvre enables states to pursue their interests through the Rome Statute system.[1007] The practice of states' outsourcing of cases that would be costly to conduct domestically simultaneously undermines one version of the anti-impunity norm, that states must hold individuals accountable for abuses domestically, while fulfilling another contrasting version of the norm, that states do not need to hold individuals accountable in domestic courts.

[1007] This observation echoes the response of a Congolese army officer when asked why the Congolese judiciary could not prosecute high-level suspects. "International criminal justice is a jungle, in which only the strongest animals survive...You must understand, that the ICC is only a subsidiary court. States decide whom to prosecute in the first instance. This is complementarity." Labuda 2017, viii.

In one-sided victories, one of the risks of neutralising one's opposition through judicial means is the assumption that those replacing the indicted leader will be moderate and work towards ensuring stability.[1008] Over time, the Ouattara administration adopted an associational approach towards the moderate branch of the Gbagbo-affiliated opposition as it was deemed highly politically valuable to the future of the democratic country and to enabling the Ouattara administration to continue governing, especially in light of the legislative and presidential elections. In contrast, the administration adopted an exclusionary approach towards the radical branches of the Gbagbo-affiliated opposition. As illustrated in Chapter 5, this was reflected in the ways in which moderates and hard-line opposition members received contrasting treatment by the national courts. Needing an opposition with which to engage, one of the ways in which Ouattara administration sought to overcome the FPI's decision to boycott elections was through leniency in the penalties for alleged criminal conduct for certain moderate politicians. In this sense, selectively supporting and obstructing anti-impunity measures helped both neutralise the opposition, through *en masse* arrests, long sentences, and transfers to the ICC, enabled a valuable moderate opposition to emerge, through more lenient accountability measures.

In parallel, the threat of justice and the promise of impunity helped regulate relations between the government and the security services, crucial to maintaining effective control over the country. The Ouattara administration depended heavily on the ability of the former ComZones to securitise the territory and to lead the military. Within this associational approach towards the ComZones, who had high perceived political value in light of their very strong spoiler power, elite actors took measures to obstruct accountability measures, including offering promotions and creating obstacles for judicial actors to pursue investigations against the ComZones who were accused of grave abuses in order to protect the loyalty of these key military figures. The scope for accountability was thus set in ways that would not derail stabilisation objectives through indictments of politically valuable commanders within the security apparatus, while nevertheless maintaining the threat of accountability as leverage of these key power-holders and thereby continuing to formally uphold the government's professed commitment to anti-impunity.

[1008] Vinjamuri 2010, 195.

Mali

Since the beginning of the conflict in early 2012, the Malian authorities approached the idea of accountability as a source of coercive leverage and a means of selective neutralisation to shape the balance of power within the country in a way that favoured Malian authorities' ability to regain control over the territory. First, the civilian authorities adopted an exclusionary approach towards Captain Sanogo, the leader of the coup against the government. Yet, Sanogo was crucial in organising a transition to a civilian government and key to mobilising the army to regain control over the north. In light of his high perceived political value as well as his strong spoiler power, and despite his alleged involvement in the execution of elite Red Berets members, civilian leaders set the parameters of accountability strategically. In order to incentivise Sanogo to cede power, he was offered a limited amnesty that formally respected the prohibition of amnesty for grave abuses while nevertheless clearly signalling to him that he would benefit from impunity. At the same time, Malian authorities issued a self-referral to the ICC, which could override any effort to protect Sanogo from criminal accountability and could be used as a source of leverage over him.

Over the next few years, Sanogo's perceived political value diminished. After investigations by domestic judicial actors, Sanogo was charged in late November 2013 for alleged involvement in the murder of the Red Berets members. The new government, led by Ibrahim Boubacar Keita (IBK) saw value in neutralising Sanogo in order to reduce the influence of the former junta and consolidate its authority over the military hierarchy. The trial was opened in December 2016. However, successive procedural delays stalled the trial, which was still not reopened at the time of writing. This prompted many actors, including the defence lawyer, the victims' lawyer, and the President of the Association of Prosecutors and Plaintiffs (Association des procureurs et poursuivants, AMPP) to accuse the government of showing a lack of political will.[1009] This situation suggests that the cost of holding the trial of Sanogo was deemed too high, the cost of releasing Sanogo and others was also deemed high, and the cost of holding Sanogo in detention beyond the statutory limit was deemed acceptable. This suggests that Sanogo maintained a certain degree of perceived political value, likely due to his strong spoiler power in light of his continued support within the military, but not high enough to be released. At the same time, the selective release of other accused reveals bargaining

[1009] Studio Tamani 2019.

around accountability for individuals with high political value. Indeed, the interim release and subsequent promotion of Ibrahim Dembélé to Inspector General and later Minister of Defense, reflects the associational approach taken by the government towards certain accused such as Dembélé and points to the aim of protecting intra-group loyalties.

The relationships outlined in Table 3 also help explain the way in which authorities addressed the question of alleged criminal responsibility of the members of various northern armed groups. In the context of the protracted negotiations, during which the government adopted an associational approach towards certain armed groups, the threat of prosecution was lifted for selected individuals to incentivise them to join the negotiations and accept the peace agreement. As illustrated in detail in Chapter 7, this can be seen by tracing how the decisions to lift arrest warrants paralleled critical moments during negotiations as well as how certain valuable actors' political trajectory was facilitated through transactional impunity. Despite their recent affiliations with deemed-terrorist groups, certain actors swiftly rehatted when the political circumstances changed, joined the negotiations, and benefitted from impunity.

In parallel, certain individuals with lower perceived political value to the negotiations and low spoiler power were eventually tried, such as Touré, Al Mahdi, and Al Hassan, while individuals who were deemed more politically valuable and who held leadership positions within the same and other armed groups were spared. As explained further in Chapter 7, Touré's superior in the Islamic Police during the occupation in Gao, Yoro Ould Dah, was released from custody as part of the peace process and held a leadership position in a government-aligned coalition of armed groups. Similarly, Sanda Ould Bouamana, the spokesperson of the same armed group to which belonged Al Mahdi and Al Hassan, was released from custody in August 2015 despite the international arrest warrant against him issued by Mali, prompting outrage among both Malian military officials[1010] and human rights groups.[1011] Also, Houka Houka, the judge of the Islamic Tribunal in Timbuktu, was released. While the exact reasons for his release are shrouded in secrecy, it reflects his high political value.[1012] All had been mentioned in criminal complaints submitted by human rights groups.

[1010] According to a senior Malian military official, "We're baffled by the liberation of this terrorist, who was at the forefront of the jihadist occupation." Bavier 2015b.
[1011] FIDH 2015b.
[1012] The case of Mohamed Ag Mousa ('Hammar Mousa') reflects similar dynamics. Mohamed Ag Mousa served as the Islamic Police officer in Timbuktu and was the feared chief of a militia that "made terror reign in Timbuktu during the occupation."[1012] Though he was accused by human rights groups of "crimes against humanity, including rape, torture, imprisonment or

The trials of Al Mahdi, Al Hassan, and Touré dispelled attention from these other, often higher-level, individuals. The Mali case suggests that, to avoid prosecution, one should either make themselves politically valuable or so politically insignificant that one's prosecution would not remotely satisfy the imperative of prosecuting "those most responsible" for abuses. Being in a 'middle management' position decreases the likelihood that the threat of accountability will be lifted. Rather than unique to Mali, or to the Ouagadougou and Algiers peace processes, this practice of providing impunity based on patronage networks reflects a typical practice of "politics of the envelope," in which politically valuable actors are "incorporated or at least temporarily neutralized by being paid illicit monies or granted posts that would facilitate their self-enrichment."[1013] Rather than posts or envelopes, impunity can also be offered.

To recapitulate, the cross-cutting relationships can be summed up in two general observations regarding how elites use anti-impunity measures to shape the balance of power with the opposition and optimise the government's ability to extend control over the territory. First, in terms of obstructing accountability, *even when the ICC has opened preliminary examinations and investigations, formal and informal amnesty measures are used to shape the conduct of politically valuable individuals by a) incentivising them to cede power*, b) *incentivising them to join negotiations and accept a political settlement and c) ensuring their loyalty.* Second, in terms of supporting accountability, *national authorities supported and cooperated with accountability measures in order to a) neutralise politically non-valuable opponents and b) dispel attention from other alleged perpetrators who were more valuable.*

By tracing the micro-dynamics of decision-making, and showing when accountability was pursued and stalled, this thesis complicates the general expectation that state actors use justice to rid themselves of domestic opponents and protect the impunity of members of their political and military ranks. Acknowledging the status of the accused as an opposition member is already a valuable explanatory factor that is missing from studies that only measure the number of trials and amnesties, rather than *who* is being prosecuted or amnestied. However, as this thesis demonstrates, the selectivity in the justice landscape is not simply a function of an accused individual's status as a domestic opponent nor of having been accused of grave abuses. Rather, what is key is the accused's particular place within the patronage bazaar of the domestic

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other severe deprivation of physical liberty," the arrest warrant against him was lifted on 15 June 2015 and he was reportedly present in Bamako during the signing of the Algiers peace agreement. FIDH 2015b; FIDH and AMDH 2016a.

[1013] McGovern 2003, 45.

politico-military landscape and, by extension, of the cost-benefit analysis of holding them accountable. This approach thus supports the argument that the balance of power is a central influence on the design and effectiveness of transitional justice mechanism.[1014] In parallel, it suggests that one should not focus simply on the balance of power between reformers and spoilers, but rather on the political bargaining among elites around particular individuals.[1015]

Based on these findings, is also helpful to consider the varying success in actors' strategic use of anti-impunity norm to shape the political landscape to further a particular outcome and consider what this reflects about the norm more broadly. The frequent use of formal and de facto amnesties to often successfully incentivise parties to join negotiations and cede power in Cote d'Ivoire and Mali continues the trend that Hayner and others have noted elsewhere - that it is often necessary to provide some type of provisional amnesty to facilitate negotiations.[1016] The case studies illustrate how, despite the strengthening of the anti-impunity norm and the existence of the ICC, and even in cases in which the government proactively expressed support for the norm and invited the ICC to investigate, it has not yet been strongly internalized by authorities and opposition parties. Authorities continue to issue amnesties and take measures to obstruct accountability by capitalising on the weak domestic judicial institutions. Although, normative pressure against doing so does mean that amnesties are often implicit and de facto and authorities often deny explicitly blocking justice. While the UN did block the offer of formal amnesties for international crimes during the negotiations in Mali, the silence from the broader diplomatic community and from the ICC regarding the lifting of accountability measures in both countries also mollifies concern that the anti-impunity norm and the ICC have fundamentally changed the practice and prospects of peace-making and reveals the limits of the norm's internalization.

Opposition parties also display confidence in the amnesties and protections from prosecution, including when the ICC has opened preliminary examinations and investigations. This trend does not support the view that the credibility of amnesties is waning in light of cases such as Charles Taylor and Mathieu Ngudjolo in which the accused were transferred to international courts despite benefitting from amnesties.[1017] More specifically, the contrasting

[1014] See, for instance, Bell 2017, 96.
[1015] Waldorf 2017, 61.
[1016] Hayner 2018.
[1017] This trend is particularly relevant for Gbagbo, who was aware of the experience of Charles Taylor in neighbouring Liberia, in which Taylor struck a deal to leave the presidency and go into exile in Nigeria, but was later transferred and tried at the Special Court for Sierra Leone.

cases of Sanogo and Gbagbo present an interesting way to analyse how threats and incentives are used to convince leaders to step down. Both leaders were accused of responsibility for human rights abuses and both were offered de facto amnesty to incentivise them to cede power. Sanogo accepted the offer and stood down, while Gbagbo did not. Analysing the micro-processes behind elite decision-making suggests that both had confidence in the amnesty offer but differed as to their assessment regarding the acceptability of the nature of the offer. Indeed, Gbagbo's refusal to cede power appears to provide evidence for the argument that the strengthening of the anti-impunity norm makes leaders reluctant to cede power due to fear of prosecution. However, according to the independent accounts of six key actors with first-hand knowledge of Gbagbo's decision-making, the fear of prosecution, either nationally or by the ICC, was not the reason for his refusal to cede power. According to UN SRSG Choi, the Gbagbo entourage did not take the threat of international justice seriously. In a conversation with Minister of Foreign Affairs Djédjé, Choi asked if he realised "that his friends risked being charged for crimes against humanity." Choi said that Djédjé demonstrated a "manifest lack of interest" in international criminal law. He "did not know and did not have the time to dedicate to that type of thing."[1018] A senior advisor to Choi confirmed that the threat of prosecution never came up as a potential reason for Gbagbo's intransigence, neither during the crisis nor in their meetings with Gbagbo while he was detained in Korhogo following the crisis.[1019] According to the French Ambassador, Gbagbo was not concerned with the ICC. "He ruled out the possibility. He did not take it seriously. His behaviour implied 'If they want to send me, then they should send me.' I do not think it was a factor. Possibly in the last few hours, but not during the crisis."[1020] Asked whether the ICC was mentioned within Gbagbo's entourage,

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Curiously, in pressuring Gbagbo to step down, ECOWAS envoy Obasanjo referred to Taylor as a cautionary tale. "Be prudent, think of what happened to Charles Taylor and his associates. If you cross the red line, you will be chased as long as you live and wherever you are." Notin 2013, 238. Also, The experience of Mathieu Ngudjolo in the Democratic Republic of Congo (DRC) provides another cautionary tale. In February 2008, Ngudjolo was arrested and transferred to the ICC, several months after he received a general amnesty in exchange for demobilizing his troops. The DRC government's 'bait and switch' tactic may further weaken the credibility of amnesties in light of the threat of ICC prosecution.

[1018] Choi 2015, 273. This was also corroborated by Djédjé, who explained that Gbagbo declined to give a scheduled television speech due to pressure by the hard-line faction. Interview with Alcide Djédjé, Abidjan, 4 November and 2 December 2015.

[1019] Phone Interview with senior advisor to UN SRSG Choi, 27 August 2018.

[1020] Interview with former Ambassador Jean-Marc Simon, Paris, 25 May 2016. Also, According to Colonel Héry, Defense Attaché at the Embassy of France in Côte d'Ivoire, "When the Ivorian army began using heavy weapons against the civilian population, we warned our contacts: '*Vous faites n'importe quoi*! You will be strictly sanctioned!' But they did not believe

Djédjé stated it was not discussed. "We did not talk at all about the ICC. We rather talked about amnesties." Rather than a threat, the ICC was "very, very far" from his decision-making.[1021] This suggests that Gbagbo had confidence the amnesty would be upheld by the Ouattara administration, reflecting Gbagbo's perception that the anti-impunity norm was not internalized by the administration.

A key difference between both cases is arguably the target's perception of the nature of the offer. Sanogo's decision to step down can be explained by his assessment that the exit offer was satisfactory as it included protection for prosecution and enabled him to maintain a position of power within the military. Indeed, members of the junta maintained power within the Ministries of the Interior, Defense, and Territorial Administration.[1022] Importantly, in light of his unconstitutional claim to power, he was also aware that his rule was time-limited and blatantly illegitimate. In contrast, for Gbagbo, the exit offer did not fit with his perception of the legitimacy of his constitutional claim to power and his concern that the offer of amnesty and exile, either inside or outside of the country, would leave him effectively powerless. His decision was likely shaped by the belief that his proposals for a vote recount or a power-sharing agreement were reasonable in light of his constitutional claim to power and by the misguided perception that there was still scope to negotiate a better deal, drawing on the expectation that friendly African states would support him. The significant pressure on him by hard-line members of his entourage also likely reinforced his belief that his constitutional claim to power should be respected and that he should stand up to international meddling in Ivorian politics. According to his Minister of Foreign Affairs Djédjé, who was on the moderate side, the pressure by this 'hard-core' faction, composed mainly of First Lady Simone Gbagbo, Gbagbo's Minister of Interior Desiré Tagro, Commander of the Republican Guard General Dogbo Blé, and First Vice-President of the FPI and political advisor Aboudramane Sangaré, was more influential than concern over possible prosecution.[1023] These two cases show that both leaders

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us. They insisted that we, as French, were not targeted." Notin 2013, 291. In January 2011, Robert Bourgi, a key governmental figure in France-Africa relations and historically close to Gbagbo, repeated the offer of a "golden exile" with the status of a former head of state to Gbagbo. Gbagbo's reported response suggests his lack of concern for prosecution. "Tell your friend Sarkozy that I will be his Mugabe! I will never leave Côte d'Ivoire to Ouattara – I will drench it in blood!" Notin 2013, 257.

[1021] Interview with Alcide Djédjé, Abidjan, 4 November and 2 December 2015.

[1022] Jamestown Foundation 2013.

[1023] Interview with Alcide Djédjé, Abidjan, 4 November and 2 December 2015. Also, according to SRSG Choi, the influence of this internal division within Gbagbo's entourage was evident

had confidence that the amnesty offer would protect them from prosecution but differed as to the suitability of other aspects of the exit offer.

Through in-depth analysis of actors' interests and decision-making, these case studies do not support claims that the increased threat that leaders will be held accountable for abuses, in light of the greater normative pressure to provide justice for abuses and the existence of the ICC, necessarily disincentivises leaders from ceding power. For instance, drawing on statistical analysis of leader culpability and patterns of leaders' exile from 1960 to 2010, Krcmaric argues that, while culpable and nonculpable leaders previously went into exile at nearly identical rates, culpable leaders have been about six times less likely to go into exile since 1998 – a watershed year in international criminal justice marked by the creation of the ICC and the arrest of Augusto Pinochet.[1024] Rather, this analysis thus shows the importance of taking into account target individual's underlying motivations, perception, and the environment in which they operate to understand the effectiveness of strategic offers of amnesties and threats of prosecution.[1025]

While this chapter has so far recapitulated how elites use anti-impunity measures to shape power relations and optimise the government's ability to extend effective control over the territory, thereby boosting one criteria of legitimacy, this thesis also traces how the norm is used to frame the reputation of actors as legitimate political interlocutors. It shows how, as Nouwen and Werner argue, elites used international criminal law to simultaneously frame themselves as friends of the international community as supporters of human rights and international law and frame their opposition as enemies of mankind as abusers of human rights.[1026] This thesis develops this idea further by showing how elites in both countries did not simply use accusations of responsibility for grave abuses as a means to villainise its opposition, but rather used the anti-impunity norm as a discursive axis around which to craft their reputation as legitimate political interlocutors and their opposition as illegitimate in different and shifting ways as their aims evolved over time.

In Côte d'Ivoire, during the post-electoral crisis, Ouattara invoked the norm as early as the first week of the crisis as doing so was one of the only means available to him to frame his

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as early as December 2010 when he realised the moderates would be favourable to the Kérékou option but their voices were drowned out by the hardliners. Choi 2015, 230.

[1024] Krcmaric 2018, 486-498.

[1025] Mendeloff 2017, 4.

[1026] Nouwen and Werner 2011.

government as a legitimate member of 'the global village' and frame the sovereigntist rhetoric of the Gbagbo side as merely a pretext for committing abuses against the civilian population. In the wake of the crisis, Ouattara's portrayal of the opposition shifted as it reflected the need to associate with a moderate opposition and served as a discursive axis around which to portray some members of the opposition as legitimate and others as not legitimate political interlocutors. In Mali, transitional authorities invoked their commitment to the anti-impunity norm as a means to frame their fledgling government as a legitimate member of the international community, facing a collection of criminal enemies. Since one of the justifications of international criminal justice is the protection of human diversity, which was being attacked by groups seeking to impose fundamentalist rule in northern Mali, deploying the norm helped governmental actors brand its opposition writ large – conflating both separatist and terrorist groups – as international criminals. Doing so contributed to undermining a rival narrative that sought to distinguish between separatist and terrorist groups. Yet, in the context of Ouagadougou and Algiers negotiations, authorities used the idea of the 'terrorist-as-international-criminal' as an axis around which to distinguish between legitimate and illegitimate political interlocutors, thus creating an opposition with whom the government could negotiate. Doing so obscured and overlooked the shifting links between 'non-terrorist' and 'terrorist' groups, as it 'repoliticised' influential individuals who previously belonged to 'terrorist' groups. Tracing the shifting portraits of actors in light of the political exigencies of elite strategy within a conflict-affected scenario reveals the fluidity in labelling actors (il)legitimate interlocutors.

Overall, the thesis joins other studies on the strategic use of justice by showing how the "aspirations of the normatively ambitious international society," which fuel for instance the transnational human rights activist networks that work towards cosmopolitan conceptions of governance, must still reckon with the preferences and interests of power that dominate the aspects of the old pluralist order.[1027] The findings in this thesis support Lake's analysis of conflict-related justice proceedings in the Democratic Republic of Congo, which traces how backstage political manoeuvrings determine who ends up being tried for conflict-related violence. Lake similarly finds that the quest for personal and organization survival and power explains why elites use post-conflict peace-building efforts such as human rights prosecutions strategically and support accountability against some accused and not others. Lake identifies

[1027] Hurrell 2007, 9.

similar motivations for elites to support or thwart accountability, including facilitating the removal of a potential challenger, securing a particular deal, rallying troops for a return to war, and shielding valuable subordinates.[1028] The similarity in the findings makes sense as the three cases – DRC, Côte d'Ivoire, and Mali – to some extent share key features: conflict-affected contexts, powerful political and military elites, strong executive influence over weak judicial institutions, and fluidity between armed groups and between armed groups and officials. This thesis also echoes the findings of Loken, Lake, and Cronin-Furman, who show that authorities in Sri Lanka prosecuted perpetrators of sexual violence in particular in order to generate legitimacy among key domestic audiences.[1029] Though this thesis focuses on selectivity in perpetrators, rather than selectivity in types of crimes, both studies highlight how conflict-related justice can be closely tied to elite objectives.

While this thesis argues that the selective approach to accountability is a function of internal political dynamics, other scholars analyse similarly selective approaches to accountability in other countries, though argue they are a function of responding to external pressure to pursue justice.[1030] For instance, in a detailed study on the politics of justice in the Balkans, Subotić argues that states comply with transitional justice norms in response to different types of international pressure - coercive, symbolic, and bureaucratic – and in order to gain certain benefits, such as membership in the European Union. Subotić argues that the way in which elites approach transitional justice, in response to external pressure and incentives, leads to outcomes that directly undermine the fundamental goals of transitional justice and benefit authorities.[1031] Similarly, Cronin-Furman argues that elites establish ineffective, or quasi-compliant, institutions in order to avoid external penalties such as potential reduction in foreign military or development aid.[1032] While supporting these studies' findings that actors use the norm to resolve political contestation in ways that are favourable to elite interests, in part by limiting the effectiveness and independence of national judicial institutions, this thesis shows it was not necessarily done to placate international pressure but rather according to the exigencies of the domestic landscape. It would be interesting, in future research, to explore the influence of international pressure more systematically.

[1028] Lake 2017.
[1029] Loken, Lake, and Cronin-Furman 2018.
[1030] MacDonald 2019; Leclercq 2017.
[1031] Subotić 2009.
[1032] Cronin-Furman 2015. See also Leclercq 2017.

The ICC in Côte d'Ivoire and Mali

Having explored the feedback between elite political bargaining and anti-impunity measures in the conflicts in Côte d'Ivoire and Mali, the section below focuses on the decision-making of the ICC Office of the Prosecutor and analyses why the ICC's decisions aligned with the strategic objectives of elite state actors in both countries. It also considers what this means about international criminal justice more broadly. As introduced in Chapter 1, the ICC occupies a rather paradoxical position within the highly politicised contexts of armed conflict. Treading an interpretive high-wire, the ICC Prosecutor has identified one the Court's aims as contributing to peace and security and has stated that the ICC does not want to be a spoiler, though also insists that "political considerations relating to peace and security" do not form part of the decision-making process of the OTP.[1046] The paradox of the ICC's position does not stem strictly from its nature as a legal institution that is predisposed to working in conflict zones. Rather, it emerges from its creation as a compromise between the project of international criminal justice and states' sovereignty concerns. More precisely, highlighting how a "major purpose of law is to constrain power, and yet law requires power to be enforced,"[1047] the ICC was designed to be independent from states and detached from politics while also being dependent on states and engaged in political contexts.[1048]

The way in which the OTP has navigated its position in Côte d'Ivoire and Mali continues a pattern seen in investigations based on self-referrals and Article 12(3) declarations, in which states and the Court establish a generally uncompetitive relationship and in which the ICC's decisions align with elite officials' interests. As Table 4 illustrates, the ICC arrest warrants in these cases, in contrast with cases based on *proprio motu* and UN Security Council referrals, focus only on the government's opposition. Also, the referring governments have not been accused of non-cooperation and have issued only one admissibility challenge. Further, invoking the duty to respond and prosecute international crimes was used to mobilise support and convince UN Security Council members to authorize greater force against the opposition. This also echoes what some scholars view of Uganda's instrumentalisation of its self-referral

[1046] Hayner 2018, 88-89. See also Bensouda 2013b.
[1047] Robinson 2015, 338.
[1048] Robinson 2011, 368. As former Prosecutor Moreno Ocampo stated, "[T]here seems to be a paradox: the ICC is independent and interdependent at the same time. It cannot act alone. It will achieve efficiency only if it works closely with other members of the international community." Moreno-Ocampo 2003.

to the ICC to justify its military operations against the LRA.[1049] On the other hand, unlike in Uganda and DRC, the ICC's activities in Côte d'Ivoire and Mali have not been accused of complicating elite's strategies within peace negotiations and undermining the use of national amnesties.[1050] This is largely due to the timing of ICC arrest warrants, which were issued after the end of the negotiations and thus did not block the talks.[1051]

Many argue, especially regarding investigations based on self-referrals and Article 12(3) declarations, that the alignment between the ICC and state interests is normatively objectionable and amounts to 'lawfare' in the pejorative sense, as it reflects how the ICC pursues 'political' justice to maintain states' support. This argument takes the form of the *apologia* critique, or that the prosecutorial strategy is too close to power and the interests of states, lacking critical bite, and is thus unprincipled or unambitious. Schabas captures this critique by stating, "when a State is actively engaged in initiation of the process, there is potential for manipulation. In effect, the state quite predictably uses the international institution to pursue its enemies…"[1052] Conversely, the *utopia* critique argues that the ICC is too removed from power, lacking in support, and thereby jeopardises its effectiveness - or even harms peace-making initiatives.[1053]

Offering a path to move beyond this apologia criticism, this section argues that it is not inherently normatively objectionable and does not reflect 'lawfare' as the Court did not *misapply* its legal mandate in order to adapt to states' preferences. Rather than being instrumentalized and assuming a submissive role to states, the OTP navigated its paradoxical

[1049] Rodman and Booth 2013, 273; Branch 2011, 191; Clark 2008, 43.
[1050] In the emblematic peace vs. justice situation in Uganda, the ICC arrest warrant for Joseph Kony was blamed for the inability of the parties to reach a peace deal. Branch 2011; Clark 2011; Souaré 2009. In Libya, De Waal notes that the ICC arrest warrants against the elder and younger Gaddafi and Senussi weakened the viability of any peaceful resolution as it "threatened to close the door on any solution that involved Gaddafi going quietly into exile." De Waal 2013, 71. See also Clark 2018.
[1051] In Côte d'Ivoire, the arrest warrants for Laurent Gbagbo, Charles Blé Goudé, and Simone were all issued after the end of the post-electoral crisis and thus did not block the termination of the crisis, but rather concretised the one-sided victory. In Mali, the ICC arrest warrants did not derail negotiations as they were issued on 18 September 2015 for Al Mahdi and on 27 March 2018 for Al Hassan, both following the signing of the June 2015 Algiers Accord. This supports Gissel's argument that low levels of ICC involvement allow mediators and parties to maintain politico-legal and discursive authority during negotiations. Gissel 2015.
[1052] Schabas 2008, 16.
[1053] Robinson 2011, 326. As Koskenniemi explains, the apologia critique highlights how decisions, when too close to power, can lack the normativity of law. The utopia critique highlights how decisions, when too far from power, can lack the groundedness of law.

position and pursued its objectives of holding at least some landmark trials without spoiling ongoing efforts to end the conflict. Indeed, while the patterns illustrated in Table 4 show how the ICC's record as a constraint on states that request its intervention is so far limited, and thus prompts apologia critiques, the table also shows that the rate of successful enforcement of arrest warrants is slightly higher in cases of self-referrals and Article 12(3) declarations compared to other trigger mechanisms, thereby placating utopia critiques.[1054] Thus, even though its inevitable selectivity benefits some actors over others, considering its political embeddedness as it crafts its prosecutorial decisions does not inherently mean the OTP undermines its legal mandate. As the Prosecutor followed its legal mandate, the controversies surrounding whether the Prosecutor upheld the norms of impartiality and gravity actually reveal tensions within these prosecutorial norms themselves. More broadly, the way in which one evaluates this practice depends on one's normative view of what the relationship between law and power, or between states and the ICC, *should* be, and whether the ICC should account for or ignore the reality that its pursuit of justice is inherently embedded in a political context.

Though created as a legal institution that is expected to contribute to the highly political project of ending conflict, it is arguably impossible for the ICC to simultaneously uphold its duty to pursue justice and contribute to ending conflict without compromising on its aspiration to not consider how its activities would shape, and be shaped by, the political environment. The prosecutorial strategies in Côte d'Ivoire and Mali are indeed the product of the 'tactical rapport' between the OTP and the government, i.e. of the relationship between the tactics used by the OTP to operate as an effective prosecutorial body and the tactics used by national authorities to navigate the post-crisis stabilisation.[1055] The section below analyses the tactical rapport in both Côte d'Ivoire and Mali and explores how various factors, namely its dependence on state cooperation, shaped the OTP's prosecutorial decisions in both countries in a way that aligned with state interests.

[1054] Koskenniemi's framework shows how any "doctrine, argument or position" can plausibly be accused of either being "too political in the sense of being too dependent on State Policy" or "too political because founded on speculative utopias." The versatility of the accusation makes it inescapable, so "the more it tries to escape from one, the deeper it sinks into the others." Koskenniemi 2006, 23-24, 65. As a result, one can only choose "which forms of perfectly plausible criticism will be applied to your decision" and which criticism your decision will simultaneously placate. Robinson 2015, 336.
[1055] Rosenberg 2017, 471.

Côte d'Ivoire

The OTP's decision to sequence its investigations, by prosecuting the pro-Gbagbo side first and committing to investigating the pro-Ouattara side subsequently, sparked huge controversy among Ivorians. Critics argue that the decision reflects pro-Ouattara bias and simply mirrors at an international level the victor's justice pursued by the Ouattara administration at the national level. At the same time, reflecting the polarised nature of Ivorian politics, one survey recorded that 47% of respondents held positive views of the ICC.[1056]

Knowing it would prompt fervent criticism, why, then, did the OTP pursue a sequenced prosecutorial strategy? To answer this question, one needs to analyse the tactical rapport between the sitting government and the OTP. The Ouattara administration had an interest in steering the country through the post-crisis transition. The OTP had an interest in serving as an effective prosecutorial body. Thus, the latter pursued a sequenced prosecutorial strategy to optimize its chances of conducting effective investigations and prosecutions against at least some alleged perpetrators. Indeed, at least three factors, both internal aspects as well as the opportunities and challenges inherent to the Ivorian context, explain the decision-making behind this pragmatic approach. This strategy nevertheless did not undermine the ICC's impartiality. Rather, the controversy reveals a tension within the norm of prosecutorial impartiality itself as the Prosecutor adopted the legalist vision of impartiality enshrined in the Rome Statute, while critics adopted a political vision of impartiality.

Regarding the tactical rapport, a first internal factor was the high stakes created by the possibility for the Court to send a strong message: that those at the highest ranks of power are still subject to being held accountable for grave crimes. Robert Jackson, referring to the Nuremberg trial, famously stated that "[c]ourts try cases, but cases also try courts."[1057] The trial of Laurent Gbagbo, the first former head of state tried by the ICC, is certainly one such case. The imperative to win may also have grown as the cases against Kenyan President Uhuru Kenyatta and Vice President William Ruto concurrently disintegrated. The OTP could not risk losing such a similar case, in which abuses were committed in the wake of a contested election by two sides, with one side closely linked to high-ranking members of the sitting government. Another aspect of internal pressures is the impact of resource limitations, which is often

[1056] Pham and Vinck 2014, 26.
[1057] Jackson 1945, 15.

underestimated. The OTP consistently claimed that while investigations covered abuses committed by all parties, resource constraints and unforeseen developments, such as the Mali self-referral and the transfers of Bosco Ntaganda and Dominic Ongwen, forced them to prioritize the Gbagbo case.[1058] Faced with a limited budget and multiple investigations with uncertain futures, the Prosecutor decided to "prioritize and focus on those investigations that seem most urgent or the most likely to move forward."[1059]

Second, in light of external factors, the likelihood of successfully investigating the Gbagbo side appeared high. Laurent and Simone Gbagbo were already detained, President Ouattara had repeatedly committed to cooperating with the ICC, and the Prosecutor had valuable diplomatic support as international consensus viewed Gbagbo as the main obstacle towards peace.[1060] Further, due to the presence of journalists, defectors from the Gbagbo side, and UN and French officials, there was significant evidence available regarding events that occurred in Abidjan, where pro-Gbagbo forces were accused of committing most of the abuses.[1061] In the wake of the crisis, conducting investigations in Abidjan was more feasible than in the west due to continued insecurity, where most of the abuses by pro-Ouattara forces took place.[1062] Thus, according to an advisor to the Prosecutor, the OTP was able to quickly open cases against the Gbagbo side. "There was a lot of information, videos and allegations about the events in Abidjan. These pieces of evidence pointed us fairly quickly to those persons who we believe were responsible for part of the crimes."[1063] It was also crucial to not let evidence succumb to the perils of time. "When you have a team working on a particular event - we prefer to talk about events, not one side or the other side - you don't leave it and rush to another."[1064] As evidence is gathered, and the viability of a given case improves, increased resources are needed to process, translate, analyse the information, and take further steps. "We

[1058] Office of the Prosecutor 2013c, 14; Office of the Prosecutor 2015, 18.

[1059] Whiting 2014, 176.

[1060] The UN Security Council Resolution 1975 (2011) established targeted sanctions against Laurent Gbagbo, citing "obstruction of the peace and reconciliation process, rejection of the results of the presidential election." UN Doc. S/RES/1975 2011.

[1061] Straus 2011, 483.

[1062] UN Doc. S/2012/766 2012, 3.

[1063] Leeuwen 2015.

[1064] Interview with two ICC officials, The Hague, 21 September 2016.

had to sequence investigations because we managed to achieve results."[1065] As Prosecutor Moreno Ocampo explained, "It was less complicated to get evidence against Laurent Gbagbo and Blé Goudé."[1066]

Third, due to a factor beyond the OTP's control, the strategy of sequenced prosecutions was pragmatic in light of the challenges of prosecuting both sides simultaneously. Even if the OTP had sufficient resources, it is unlikely that the Prosecutor would have launched simultaneous parallel investigations into both sides as this would have risked jeopardizing state cooperation due to the influence held by those most likely to be directly or indirectly affected by investigations into the pro-Ouattara side, namely the ex-ComZones. Put differently, the OTP risked sawing off the branch it was sitting on, i.e. the cooperation by Ivorian authorities. This is because, by cooperating with ICC investigations against influential individuals, the Ouattara government itself risked sawing off the branch it was sitting on, i.e. the support of the ComZones who were crucial figures in the security apparatus.[1067] The OTP's experience in Kenya also serves as a cautionary tale. Its decision to charge high-level influential individuals on both sides of the conflict simultaneously prompted significant political meddling that contributed to the case's unravelling. Rejecting accusations of biased investigations in Côte d'Ivoire, the OTP's Head of International Cooperation explained that the Office had "learnt from [its] experience in Kenya that it is better to first secure cooperation from the government."[1068]

More concretely, parallel investigations would also have faced practical challenges. The risk of intimidation faced by victims and witnesses who would help to build a case against pro-Ouattara leaders was high. According to an observer very familiar with the dynamics within the security apparatus, some military leaders are unable to sanction the former ComZones.[1069] Ivorian Ministry of Justice officials acknowledged that lack of domestic protection measures may discourage witnesses and victims, particularly victims of crimes committed by pro-Ouattara forces, to come forward.[1070] Another practical challenge relates to the difficulties in gaining the trust and cooperation of witnesses and victims of crimes by pro-

[1065] Interview with two ICC officials, The Hague, 21 September 2016.
[1066] Interview with former ICC Prosecutor Luis Moreno-Ocampo, Oxford, 12 May 2018.
[1067] Rosenberg 2017, 475.
[1068] Louw-Vaudran 2014.
[1069] Interview with senior official in an international organisation, Abidjan, 11 December 2015.
[1070] HRW 2013, 54.

Ouattara forces. Members of the truth commission noted reluctance in certain pro-Gbagbo communities to engage with justice-related mechanisms, as they deplore Gbagbo's arrest and were sceptical of engaging with governmental or ICC initiatives.[1071] Viewed together, the apparent feasibility of investigating crimes by pro-Gbagbo forces in Abidjan, the limited resources, the risk of jeopardizing cooperation by Ivorian authorities, and concerns regarding victims and witnesses rendered investigations into pro-Gbagbo forces first more likely to be effective. This higher likelihood of conducting effective investigations, of course, does not mean the case against Gbagbo and Blé Goudé will ultimately result in a conviction.

Impartiality at Stake?

A range of actors, from Gbagbo's supporters, to human rights organisations, to UN human rights monitors have expressed criticism of the OTP's strategy.[1072] Critics argue that upholding prosecutorial impartiality requires both sides to be prosecuted at the same time in order for the investigations not to weaken the pro-Gbagbo side while leaving the pro-Ouattara side untouched. This strand of criticism is the apologia critique of the 'too close/too far' dyad, featuring claims that "too much contact with states leads to fears about erosion of independence, secret 'side agreements,' or at least of the temptation to alter case selection to reflect the presumed wishes of the partner." Conversely, the OTP's strategy placated the utopia critique, which argues "you are not doing enough to maintain relations with partners and thus undermining your effectiveness."[1073]

Even though the OTP's strategy aligned with the government's interest, and even bolstered its power position vis-à-vis its opposition, it does not mean the Prosecutor is undermining the mandate of acting impartially. Assessing whether this undermines the OTP's mandate of impartiality depends on one's vision of impartiality, and more broadly of what the relationship between the OTP and states should be. As this author has developed more

[1071] Respectively, interviews with former staff members of the Commission on Dialogue, Truth and Reconciliation, Abidjan, 11 November 2015 and 2 December 2015.

[1072] For example, the president of one of the foremost Ivorian human rights groups lamented that "the ICC regularly comes to Abidjan but is only prosecuting the pro-Gbagbo side, even though we know that … both sides are guilty and their responsibility has been established." BBC 2014; Rosenberg 2017, 479 – 480.

[1073] Robinson 2015, 339.

extensively elsewhere, this is because the Prosecutor and her critics are speaking at cross-purposes as they operate under two different visions of impartiality – the legalist and the political visions.[1074] These visions fundamentally disagree on two issues: whether investigations against both sides should be simultaneous and whether judicial proceedings should purposely avoid shaping the balance of power between parties.

According to the legalist vision, which is most clearly enshrined in the Rome Statute and the OTP's policy guidelines, and which underpins the OTP's approach, the Prosecutor shall "apply the same processes, methods, criteria, and thresholds for members of all groups, without any distinction based on grounds outlined in articles 27(1) and 21(3) of the ICC Statute."[1075] Focusing on the Prosecutor's 'state of mind' in relation to the issues and the parties, such impartial conduct must encompass even-handedness among possible targets of investigations and "fair-minded and objective treatment of persons and issues."[1076] Notably, there is no requirement of simultaneous impartiality, meaning sequenced investigations are perfectly in line with the OTP's mandate. Relatedly, impartial judgment during decision-making does not have to ensure that the outcome of this treatment is the same. Though it may seem paradoxical, as outlined in the OTP's Policy Paper on Case Selection and Prioritisation, pursuing an impartial strategy "may in fact lead to different outcomes for different groups." The Prosecutor should not seek to establish "equivalence of blame" within a situation nor "create the appearance of parity between rival parties by selecting cases that would not otherwise meet the criteria."[1077] In other words, the Prosecutor should not act in an arithmetic fashion and prosecute three from one side and three from the other just to appear impartial. Thus, if the domestic balance of power is tipped as a result of the Prosecutor's actions, so be it.

However, criticism is grounded in the political vision of impartiality, which judges the Prosecutor's impartiality based on its appearance of political neutrality. In contrast to the procedural and internal dimension of the legalist vision, the political vision can be understood as the perceptual and externalized dimension of the Prosecutor's decision-making process. The key question to be asked is 'did the Prosecutor's decision appear to benefit one side of the conflict?' As famously stated by a United States Supreme Court Justice, "[j]ustice must satisfy

[1074] Rosenberg 2017, 2017.
[1075] This includes gender, age, race, color, language, religion, political or other opinion, national, ethnic or social origin, wealth, birth, or other status, or official capacity. Office of the Prosecutor 2016, 19-20.
[1076] Rhoads 2016, 27.
[1077] Office of the Prosecutor 2016, 19-20.

the appearance of justice."[1078] Also, in *Daktaras v. Lithuania*, the European Court of Human Rights concluded that "even appearances [of impartiality] may be of a certain importance."[1079] Notably, underlying the expectation that all individuals must be seen to be treated equally and in a politically neutral and balanced manner is an implicit expectation that they be treated equally at the same time. Put simply, there is an expectation of simultaneous impartiality. As the leader of an Ivorian human rights organisation deplored, "[j]ustice delayed is justice denied."[1080] Relatedly, being impartial means being politically neutral and balanced. Counter-intuitively, then, the Prosecutor should avoid tipping the balance of power by shaping prosecutions according to the balance of power. In sum, because of the tension within the norm of impartiality itself, the Prosecutor can reasonably argue she is acting impartially while reasonably being accused of bias, as both sides presume clashing visions of impartiality.[1081] Reflecting the "dual quality" of norms in international relations, these visions can be at odds and in tension with each other, thereby generating disagreement over the norm's meaning in practice.[1082]

Mali

The OTP's approach in Mali was much less controversial than its strategy in Côte d'Ivoire. Nevertheless, the trial of Al Mahdi, as well as the more recent transfer of Al Hassan, raise pertinent questions around the Prosecutor's case selection. The OTP optimised its chances of conducting effective investigations and prosecutions against at least two alleged criminals whilst not undermining the Malian government's interests. By questioning why more senior individuals were not prosecuted and why the charges left out the crime of sexual violence,

[1078] Offut v. United States, 348 U.S. 11, 14 (1954).
[1079] Judgment, Daktaras v. Lithuania, ECtHR (2000), Appl. no. 42095/98, 30-32.
[1080] Interview with the president of an Ivorian human rights organisation, Abidjan, 3 December 2015.
[1081] Commenting on the Côte d'Ivoire strategy, the ICC Deputy Prosecutor James Stewart insisted that the OTP was impartial but, '[s]ometimes … [y]ou have to make a choice between action and paralysis and between pragmatism and ideals. And I think if you choose pragmatic action, you really shouldn't be criticized." Kersten 2013.
[1082] Wiener 2007.

critics questioned whether these cases fulfilled the ICC's raison d'être - to prosecute those *most* responsible for the *most* serious crimes.

Whereas the question at the heart of the controversy in Côte d'Ivoire was the legal concept of impartiality and the broader idea of equilibrium, or whether the ICC was unduly exacerbating the political balance of power, the question at the heart of the debate surrounding the prosecutorial strategy in Mali is the legal concept of gravity and the broader idea of hierarchy, or whether the ICC was pursuing a strategy that undermined the Court's *telos* of prosecuting those who bear the greatest responsibility for the gravest crimes. As argued below, the prosecutorial strategy did not undermine the gravity criterion of the ICC's mandate as the Prosecutor adopts the legalist vision of gravity enshrined in the Rome Statute, while critics adopt the teleological vision of gravity. The section below first analyses the tactical rapport, showing how at least three factors, based on internal factors as well as the opportunities and challenges inherent to the Malian context, shaped the Prosecutor's strategy. It then presents how the concerns raised by observers reveal a tension within the concept of gravity in international criminal law.

Why did the OTP pursue a rather minimalist prosecutorial strategy, first targeting Al Mahdi for only one charge more than three years after the opening of its investigation?[1083] First, this strategy represented the possibility for the Court to break new ground as it set a number of firsts. The Al Mahdi conviction marked the first time the ICC prosecuted the crime of directing an attack against buildings dedicated to religion and historic monuments which were not military objectives, pursuant to Article 8(2)(e)(iv), the first time this charge was the sole charge of any case at the ICC, ICTY, and ICTR, and the first time a defendant at the ICC pled guilty. It was hailed by academics and human rights organisations as a landmark moment in international justice that "send[s] a powerful message of international condemnation,"[1084] a "victory for the victims of crimes committed in Mali since 2012,"[1085] and a "clear message on attacking world's treasures."[1086]

It also marked the first time an Islamist was prosecuted in The Hague and thus the first the ICC could so actively position itself as a partner in the "war on terror" against, as Al Mahdi

[1083] As the Al Hassan case had not begun at the time of writing, this section focuses primarily on the case against Al Mahdi.
[1084] Rosenberg 2017b.
[1085] FIDH 2016b.
[1086] HRW 2016b.

characterised them, the "deviant people from Al Qaeda and Ansar Dine."[1087] In announcing the investigation just five days after Operation Serval began, Prosecutor Bensouda stated, "Justice can play its part in supporting the joint efforts of the ECOWAS, the AU, and the entire international community to stop the violence and restore peace to the region."[1088] By prosecuting the destruction of the world-renowned Timbuktu mausoleums, it served as a message of international condemnation of similar acts elsewhere, to which the international community was unable to respond either by force or by law.[1089] At a regional level, this strategy was also helpful in countering the confrontation between the ICC and African states, as it illustrated cooperation between the Court and both Mali and Niger. As Prosecutor Bensouda stated, "Key regional and international organizations have acknowledged the need for justice as part of the resolution of the crisis in Mali."[1090] This framing was particularly advantageous in light of the broader anti-ICC mobilisation amongst African state leaders and the AU.

Second, the likelihood of successfully investigating Al Mahdi appeared high. Mali's request for ICC intervention in July 2012 signalled its intention to cooperate with the Court, Al Mahdi was already detained in Niger and committed to cooperating with OTP investigators early on, and, most importantly, much damning evidence presented against him was easily accessible. This footage includes videos showing Al Mahdi in a blue vest with the label "Comité Al-Hisbah, Timbuktu," carrying a Kalashnikov and explaining to journalists the reasons why the buildings needed to be destroyed: "We are going to wipe out from our landscape all that does not belong there."[1091] The videos also show him at the mausoleums, sometimes holding a pickaxe, encouraging other men to destroy the tombs. He basically took a 'selfie' while committing a war crime. Other accessible evidence includes satellite imagery of the mausoleums, archive photographs of the mausoleums before their destruction, and legal documents regarding the protected status of the buildings. This availability of evidence reduced the need for ICC investigators to grapple with the security challenges in Timbuktu, not only

[1087] Transcript of Al Mahdi Hearing, 9.
[1088] Office of the Prosecutor 2013a.
[1089] These include the destruction of archaeological sites like Nimrud in Iraq or Palmyra in Syria, as well as the destruction of huge Buddhist shrines in Bamiyan by the Taliban in 2001. The ICC does not have jurisdiction over Iraq or Syria, since neither is a State Party. While a UN Security Council referral could bypass this obstacle, Russia and China exercised their veto when this was raised in a Security Council meeting in May 2014. Regarding Afghanistan, the destruction of the statues falls outside the ICC's temporal jurisdiction, which stretches only as far back as 2002.
[1090] Office of the Prosecutor 2013a.
[1091] Rosenberg 2016b.

for themselves but also for the people with whom they interact.[1092] These factors made the Al Mahdi case an evidentiary "slam dunk," enabling the Prosecutor to carry out a landmark case while spending few precious resources.

These factors also meant that investigations into the destruction of cultural heritage were easier than investigations into other crimes, namely sexual violence. As Heller notes, "It's difficult to prove sexual violence…You have to investigate, to get witnesses. It's not like cultural monuments that people saw. This is time-consuming and expensive."[1093] This is particularly the case in Mali, where sexual violence is a taboo subject and in which many individuals potentially responsible for crimes committed in Timbuktu still reside in or around the area. According to a member of the OTP, the ICC did not have evidence that was solid enough to broaden the charges against Al Mahdi but the investigation for crimes such as sexual violence was "still in progress."[1094] These investigations indeed led to the charge for sexual violence issued against Al Hassan, a case built upon the Al Mahdi case.

Third, due to a factor beyond the OTP's control, the strategy of prosecuting Al Mahdi, and later Al Hassan, rather than individuals at higher levels of the echelon, was pragmatic in light of the dynamics of the Malian context. A quick scan of those potentially responsible for alleged crimes during the Timbuktu occupation shows that most other individuals who served in the leadership circles during the occupation are either dead, in hiding, or – more importantly - protected through political interests. At the highest levels of AQIM leadership in Timbuktu was Abou Zeid, the "Governor" of Timbuktu during the occupation, and Yahia Abou Al Hammam, who is AQIM's Emir for the Sahara and a US and UN-designated terrorist. The former was confirmed dead in March 2013 and the latter is in hiding. Abdallah Al Chinguetti, a religious scholar within AQIM and member of the Presidency in occupied Timbuktu, who was named by the OTP as "a member of the common plan"[1095] to destroy the mausoleums, was also confirmed dead in June 2013.

[1092] Highlighting the high feasibility of the Al Mahdi case is not to say the ICC took an "armchair" approach. Between September 2014 and September 2017, the OTP conducted 91 missions to at least nine countries to collect evidence and build cooperation with states regarding the Mali situation. ICC Assembly of States Parties 2015; ICC Assembly of States Parties. 2016; ICC Assembly of States Parties 2017.

[1093] Forestier 2016.
[1094] Forestier 2016.
[1095] Prosecutor Submission on Sentencing, para 33.

Further, as explained in Chapter 7, several individuals (in addition to Al Mahdi and Al Hassan) were named by human rights groups in criminal complaints as bearing alleged responsibility for human rights abuses. Of these, the most influential is Iyad Ag Ghaly, the leader of Ansar Dine and present in Timbuktu during the occupation, who allegedly took the decision to destroy the mausoleums.[1096] To illustrate his politico-military weight, one official referred to him as the "Darth Vader" of Mali.[1097] Though he is the head of a recently-formed alliance of terrorist groups – the al Qaeda's Group for Support of Islam and Muslims (Jama'a Nusrat ul-Islam wa al-Muslimin,' JNIM) – he is also seen by many as crucial for the conflict's resolution.[1098] Also named in criminal complaints were individuals who formed the local level of leadership and who were recruited from the Timbuktu region in order to administer the new institutions. These included the spokesperson of Ansar Dine, Sanda Ould Bouamana, who was also named in an ICC briefing and was, as mentioned previously, released from custody as part of the negotiations and is now in hiding.[1099] Also, despite the widely known accusations against him, Houka Houka, the judge of the Islamic Tribunal of Timbuktu, was arrested by Malian authorities based on charges of human rights abuses and then released. He now lives freely in the Timbuktu region, with the tacit acceptance of Malian authorities.

These examples reveal how other individuals at equal or higher echelons of leadership as Al Mahdi and Al Hassan are beyond the reach of the ICC and show how the ICC must navigate the vagaries of killings, captures, and releases of actors in the Sahelian 'war on terror.' In contrast, the apprehension of Al Mahdi and Al Hassan was feasible, as there was both state willingness and ability to transfer them to the ICC, likely due to their low political value in the eyes of Malian or regional states. Ironically, in the age of the ICC, these individuals then become "'larger-than-life' characters, who stand in for all the numerous others who could not be found or who could not feasibly be tried."[1100] Viewed together, his detention, the evidentiary basis against him, and his particular political profile rendered the prosecution of Al Mahdi for the destruction of cultural heritage in Timbuktu highly likely to be effective and swift.

[1096] Transcript of Al Mahdi Hearing, 30.
[1097] Author interview with official in French Ministry of Defence, Paris, 25 November 2016
[1098] One of the more controversial conclusions of a national dialogue conference, which gathered Malians from all sectors of society in March 2017, was to consider negotiating with Ag Ghaly.
[1099] Office of the Prosecutor 2012.
[1100] Minow 1999-2000, 431.

Gravity at Stake?

Critics of the ICC Prosecutor's strategy to first charge Al Mahdi with one charge of destruction of cultural heritage argue that the ICC is erring in not prosecuting an individual with greater responsibility and for crimes deemed graver.[1101] This is a two-fold criticism highlighting the degree of participation of the alleged perpetrator and the impact of the crime. This criticism is the apologia critique of the 'too low and too easy / too high and too hard' dyad, in which critics argue that the prosecutor's opportunism steers her away from powerful actors and fails "to fulfil the true ambitions of the project." Conversely, the prosecutor's strategy placated the utopia critique, which argues that the Court errs by focusing unrealistically on 'big fish,' rather than manageable cases, thereby undermining its effectiveness.[1102]

These visions disagree as to whether the Prosecutor's decision to charge certain individuals with certain crimes reflects her judgment that these are the worst individuals and the worst crimes. According to the legalist vision, the one enshrined in the Rome Statute and that underpins the OTP's policies, the OTP "will select cases for investigation and prosecution in light of the gravity of the crimes, the degree of responsibility of the alleged perpetrators and the potential charges."[1103] However, the notion of gravity, which is not defined in the Rome Statute, allows room for prosecutorial discretion, including starting with lower-level perpetrators. Identifying who is most "most responsible" can be determined in various ways based on the facts of the case and on a number of criteria.[1104] The Rome Statute also does not necessarily equate the responsibility to the *de jure* status of an individual within a structure. Various policy documents also indicate that the OTP is open to "a strategy of gradually building upwards" in order to ultimately have a reasonable prospect of conviction for the most responsible and will also "consider prosecuting lower level perpetrators where their conduct has been particularly grave or notorious."[1105] During the trial, the Prosecutor indeed

[1101] In an unrelated criticism of the case, Schabas argues that Al Mahdi's destruction of the mausoleums did not constitute an "attack" and should not have led to his conviction. Schabas 2017.
[1102] Robinson 2015, 336-337.
[1103] Office of the Prosecutor 2016, para 6, 34.
[1104] These include the nature of the unlawful behaviour; the degree of their participation and intent; the existence of any motive involving discrimination; and any abuse of power or official capacity. Office of the Prosecutor 2016, para 43.
[1105] Office of the Prosecutor 2013c; Office of the Prosecutor 2014; Office of the Prosecutor 2016, para 42.

highlighted that Al Mahdi bore great (not greatest) responsibility as a leading member of a group of people pursuing a common plan. Further, while the crimes covered by the Rome Statute are deemed the worst crimes, there is no legal hierarchy *within* these crimes. In other words, while the spotlight has recently increased on sexual and gender-based crimes as particularly heinous, and while genocide is deemed the "worst of the worst" crimes, there is no formal ranking of crimes as graver than others. Rather than arguing the destruction of the Timbuktu mausoleums was the worst crime perpetrated in Mali, the OTP went to great lengths to argue that the landmark case would show the need to treat this crime as equally grave as the others.[1106] Importantly, the trial of Al Mahdi for attacks on bricks-and-mortar likely helped built the case against Al Hassan, who served as Al Mahdi's colleague in Timbuktu, and who is charged for both attacks on cultural buildings but also for crimes against people, including torture, rape and sexual slavery, and persecution.

However, criticism is grounded in the teleological vision of gravity, which argues that, since the purpose of the ICC is to hold accountable those most responsible for the gravest crimes, then the Prosecutor's decision to pursue Al Mahdi reflects her assessment that Al Mahdi is *the* most responsible and that the destruction of cultural heritage was *the* worst crime committed in Mali during the occupation. This also assumes there is a common metric by which this could be reasonably judged, which opens up a debate over who is the most responsible and which crime is the worst. In other words, this vision argues that the ICC's prosecutorial strategy reflects the Prosecutor's general normative judgment on the hierarchy of responsibility of all perpetrators and the hierarchy of all crimes committed. This criticism is captured by a fascinating op-ed written by Fatouma Harber, a teacher in Timbuktu, who questioned whether Al Mahdi was "deserving of the role *in which he is being cast* – as a major player in the occupation?...[Al Mahdi] is just a little fish." Harber also argues that "[t]he cutting off of people's hands and the executions that took place during Ansar Dine's "new style" sharia for almost a year *appear to be lesser crimes* than the destruction, in which Al Faqi played a part, of UNESCO World Heritage sites."[1107] This is a much more widely noted criticism among those working in Mali and argues that physical harm, and especially sexual violence, should be deemed more heinous than the abstract harm caused by the destruction of the Timbuktu

[1106] According to an advisor within the OTP, "It's important to send the message that this is a grave crime that must be punished and that attacking the identity of people and their values cannot be left as a secondary crime." Forestier 2016.
[1107] Harber 2015 [emphasis added].

mausoleums. Al Mahdi is indeed among various individuals accused of sexual violence during the occupation against roughly 100 women, a low estimate.[1108] Put differently, while defending humanity, one should not overlook the humans. Overall, assessing whether the alignment between the OTP's strategy and the government's interest undermines the OTP's mandate of prosecuting the most responsible for the worst crimes depends on one's assessment of whether one adopts a legalist or teleological vision of gravity.

Beyond the impact of the ICC's reliance on state cooperation in navigating its particular paradoxical position, another axis that enables a mutually advantageous relation is the complementarity regime. The complementarity regime enables states to deploy different versions of the norm as it fits their strategic objectives. Indeed, it enables states to deploy one version of the norm – that states do not need to prosecute international crimes and can instead outsource the cases through a burden-sharing approach to the ICC – while undermining the other version of the norm - that states have a duty to prosecute international crimes. As Schabas puts it, states can "respect its obligation to prosecute by failing to prosecute."[1109] This potential for strategic burden-sharing was already flagged during the Rome negotiations, when a representative noted that the Court "should not be used as a 'garbage can' into which national court systems dump criminals that they should be punishing at the national level."[1110] If these two versions of the norm can be reconciled into a broader imperative – that states investigate and prosecute nationally and, when unable or unwilling, cooperate with legal proceedings by international courts – then the inaction and unwillingness expressed by states can be understood as not normatively problematic.[1111]

[1108] Phone Interview with Malian human rights lawyer, 2 February 2017. Interview with researcher for a human rights organisation, Paris, 23 November 2016.
[1109] Schabas 2008, 7. For example, regarding the transfer of Al Mahdi to the ICC, Volgevang and Clerc argue that "the decision to prosecute Al Mahdi [at the ICC] seems to be contrary to the complementarity principle of the ICC, and against the rationale of establishing the ICC in the first place." Volgevang and Clerc 2016.
[1110] L/2773 1996.
[1111] For further discussion, see Robinson 2011, 376.

To facilitate such burden-sharing, governments in both Côte d'Ivoire[1116] and Mali[1117] expressed a strategic admission of incapacity to prosecute grave crimes domestically. Further, neither government contested the admissibility of any case - except for that of Simone Gbagbo. As detailed in Chapter 5, the Ivorian government anticipated that a domestic trial of Gbagbo and Blé Goudé would be very costly and transferring them to The Hague would weaken its opposition. Regarding Simone Gbagbo, it deemed that a domestic trial would generate high costs, but that a transfer to the ICC would generate even higher costs.[1118] Also, in Mali, even though investigations had been opened by investigative judges in Bamako into a criminal complaint lodged by human rights organisations that identified both Al Mahdi and Al Hassan as potential perpetrators, no case had officially been launched. The trial of Aliou Mahamane Touré for abuses showed it was not necessarily unable to try similar cases. Rather, the government's decision to transfer them showed it was unwilling to carry out their prosecutions nationally, likely due to a lack of interest and resources. It also reflects how transferring them was not costly, as they were politically insignificant in the peace process.

Overall, by analysing the decision-making of the ICC, it explains why its prosecutorial approach led to the opening of some cases while also paralleling elite interests and strategy within the conflictual landscapes in Côte d'Ivoire and Mali. Examining the tactical rapport in both countries highlights how the OTP's strategy was shaped by both opportunities for landmark and effective investigations while navigating the patronage bazaar of post-crisis transitions. Its approach arguably upholds a certain "ethic of responsibility" in balancing its objective of upholding (at least some) justice for (at least some) victims with the risks of derailing existing efforts to stabilise a politically volatile context. Rather than straightforward

[1116] In Côte d'Ivoire, the Prosecutor noted that "no national investigations or proceedings are pending in Côte d'Ivoire against those bearing the greatest responsibility for the most serious crimes falling within the jurisdiction of the Court allegedly committed in Côte d'Ivoire since 28 November 2010", referring to statements by President Ouattara and the Minister of Justice who informed him that "the most serious crimes should be addressed by the ICC." OTP Further Information for Authorisation to Investigate, paras 3-4.

[1117] In Mali, the ICC Prosecutor noted that "the Malian authorities in referring the situation in Mali to the Court on 18 July 2012…informed the Office that Malian courts were, following the withdrawal of the judicial services from the northern cities, unable to prosecute crimes allegedly committed by armed groups in Mali." Office of the Prosecutor 2013b, para 137.

[1118] Reflecting the different cost-benefit analysis depending on the accused, Ivorian authorities thereby used somewhat inconsistent reasoning. In September 2013, Côte d'Ivoire refused to transfer Simone Gbagbo, arguing it was able and willing to try the case in domestic courts, though agreed to transfer Blé Goudé six months later in March 2014, arguing it was unable and unwilling to try the case in domestic courts.

and objective, determining whether this mutually beneficial outcome is normatively problematic depends on one's underlying vision of what the relationship between the ICC and states, or law and power, *should* be. Constructive debate over the appropriateness of this burden-sharing pattern seen particularly in cases of self-referrals and where governments request ICC intervention would thus benefit from addressing why one view is normatively more convincing than the other.

Conclusion

As of September 2018, four individuals find themselves living behind bars in The Hague. This was not the trajectory that Laurent Gbagbo, Charles Blé Goudé, Ahmad Al Mahdi, and Al Hassan had envisioned for themselves. The detention of these two pairs of 'partners in crime' is the result of a step change in the laws, treaties, and institutions aimed at ensuring criminal accountability for grave abuses – a significant shift that was driven by the work of transnational networks of human rights activists, scholars, and diplomats over several decades. By illustrating the challenges that continue to block the pursuit of justice for grave abuses, this thesis combines a cautious optimism about cosmopolitan normative ambition with a clear-eyed awareness that such progress takes place in an environment strongly shaped by sovereigntist concerns and elite interests.

This thesis seeks to explore head-on the implications of the real-world conditions of pursuing justice for grave abuses. It shows that elite actors used the anti-impunity norm as a resource as part of the political bargaining processes to favour certain outcomes over others, furthering its legitimation strategy in the context of internal conflict. This opened parallel paths of accountability for some and impunity for others. In other words, adopting a pragmatic approach to the normative expectation that states hold perpetrators of grave abuses criminally accountable, by selectively supporting or obstructing anti-impunity efforts, enabled actors to pursue objectives in the midst of conflict – including favouring the success of peace negotiations and stability – but in a way that clearly undermined the government's expressed commitment to curbing impunity irrespective of the consequences. In this sense, the normative commitment to the imperative to hold individuals accountable for grave abuses expressed by elites and displayed through certain measures is not strong enough to convince actors to pay the high costs of doing so when it would complicate elite strategic interests.

Overall, by offering novel theoretical and empirical insight, this thesis highlights the value of considering how elite political bargaining shapes the design and implementation of anti-impunity measures and the need to scrutinise not only the existence or absence of anti-impunity measures but also their quality and their selectivity. It encourages both academics and practitioners within the fields of human rights advocacy and conflict resolution to prioritize context-specific approaches that analyse the messiness of the landscape of impunity in conflict-affected contexts by considering how the anti-impunity norm is supported or subverted. Such questions include: Who benefits and who loses from the way justice was pursued? What cost-benefit calculations have taken place regarding accountability? Does the existence of the ICC pressure, or relieve, states from the imperative to hold individuals accountable for grave abuses? Future scholars will hopefully apply this framework to generate rich findings in comparable cases. For instance, to what extent does it help explain the peace and justice dynamics in the case of Central African Republic, in light of on-going negotiations amidst ICC investigations and national anti-impunity measures? To what extent does this thesis translate to cases in which national authorities have initiated justice measures but in which the ICC has not yet opened an investigation, such as Guinea and Colombia? The thesis also contributes to the study of norms in practice, showing the value in studying how norms are used by actors and encouraging future scholars to draw upon the concept of 'norm exploitation' to reveal more about the interaction between norms and practice.

When asked how the question of justice for human rights abuses was being addressed during peace negotiations in Mali, the former European Union Special Representative to the Sahel replied, "It's an impossible question."[1119] This thesis has offered a better way to understand how this "impossible question" is answered in practice. While expedient, the consequences of the pragmatism seen in both Côte d'Ivoire and Mali may indeed prove that strategically compromising on holding perpetrators accountable for grave abuses in the short-term is in fact a display of collectively irresponsibility in the long-term. Just as a country's present political reality shapes and constrains the way justice is pursued today for past crimes, the way justice is pursued inevitably shapes the country's political future. This thesis leaves it to future research to assess the long-term effects of striking political bargains around accountability in both countries.

[1119] Informal conversation with former European Union Special Representative for the Sahel Michel Reveyrand de Menthon, Cambridge, 18 March 2015.

Table 4:

Profile of Indicted Parties, Admissibility Challenges, and Non-cooperation Findings in ICC Investigations 2002-2018 (arranged by referral type)

Situation	Referral Type	Arrest Warrant for Gov. or Gov.-Affiliated Actor	Arrest Warrant of Opposition	Enforced / Total Arrest Warrants	Admissibility Challenges issued by Governments	OTP Requests for Non-Cooperation Finding against Referring Government
Uganda	Self-Referral	0	5	1/2[1121]	No	0[1122]
DRC	Self-Referral	0	7	6/7	No	0
CAR I	Self-Referral	0	2	2/0	No	0
CAR II	Self-Referral	0	0	--	--	--

[1121] Five arrest warrants were issued by the ICC. One accused, Joseph Kony, is still in hiding. Another accused, Dominic Ongwen, was transferred in 2015. Three other accused, Vincent Otti, Raska Lukwiya, and Okot Odhiambo, have died.
[1122] The ICC judges issued a non-cooperation finding against Uganda in 2016. However, this related to its failure to arrest President Omar Al-Bashir and was unrelated to the Ugandan situation at the ICC.

Côte d'Ivoire	Proprio Motu/ (Article 12(3))[1123]	0	3	2/3	Yes, *Prosecutor v. Simone Gbagbo*[1124]	0
Mali	Self-Referral	0	2	2/2	No	0
Darfur/Sudan	UNSC Referral	4	2	0/6	No[1125]	Trial Chamber IV referred Sudan to the ASP in November 2015 for failure to cooperate[1126]
Libya	UNSC Referral	3	0	0/4[1127]	Yes, *The Prosecutor v. Muammar Mohammed Abuminyar Gaddafi, Saif Al-Islam Gaddafi*	Pre-Trial Chamber issued a finding of non-compliance and referred Libya to the UN Security

[1123] While Côte d'Ivoire investigation is formally based on the Prosecutor's *proprio motu* capabilities, Côte d'Ivoire is tantamount to a self-referral, in light of the various requests made by Ouattara's government in 2010 and 2011 via Article 12(3) declarations.
[1124] The government of Côte d'Ivoire did not contest the admissibility of Prosecutor v. Laurent Gbagbo or Prosecutor v. Charles Blé Goudé. It contested the admissibility of The Prosecutor v. Simone Gbagbo in September 2013. See ICC-02/11-01/12-11-Red, 30 September 2013.
[1125] While Sudan could have challenged ICC jurisdiction over the case, it chose not to engage in a judicial manner with the Court. Sudan Tribune 2007.
[1126] Decision on Prosecution's Request for Non-Compliance Finding
[1127] Five arrest warrants were issued by the ICC. The arrest warrant against Muammar Qaddafi is not counted here as Qaddafi died in October 2011.

					and Abdullah Al Senussi[1128]	Council for failure to cooperate[1129]
Kenya	Proprio Motu	4	5	0/3	Yes, *The Prosecutor v. Francis Muthaura, Uhuru Kenyatta, and Mohammed Hussein Ali*[1130]	Trial Chamber V(b) referred Kenya to the ASP in September 2016 for failure to cooperate[1131]
Georgia	Proprio Motu	n/a	n/a	n/a	n/a	n/a
Burundi	Proprio Motu	n/a	n/a	n/a	n/a	n/a

[1128] PTC Rejection of Admissibility Challenge for Saif Al Islam Gaddafi
[1129] PTC Decision on the non-compliance by Libya
[1130] Muthaura, Kenyatta and Ali Request for Rejection of Admissibility
[1131] Finding of Kenyan Non-Compliance

List of Interviews

- Informal conversation with former European Union Special Representative for the Sahel, Michel Reveyrand de Menthon, Cambridge, 18 March 2015
- Interview with former member of UNOCI - Human Rights Division, London, 22 June 2015
- Phone Interview with researcher for a human rights organisation, 23 October 2015
- Interview with former coordinator of the coalition of civil society, Abidjan, 27 October 2015 and 30 October 2015
- Interview with Expert in Democracy and Governance - USAID, Abidjan, 28 October 2015
- Interview with Assistant Professor of Politics, University de Félix Houphouët-Boigny, Abidjan, 28 October 2015
- Interview with official from the Registry of the ICC, Abidjan, 30 October 2015
- Interview with researcher for a human rights organisation, Abidjan, 2 November 2015, 10 December 2015, 9 February 2017, 3 April 2018
- Interview with former diplomatic advisor to President Laurent Gbagbo, Alcide Djédjé, Abidjan, 4 November 2015 and 2 December 2015
- Interview with diplomat, Abidjan, 4 November 2015
- Interview with diplomat, Abidjan, 4 November 2015
- Interview with diplomat, Abidjan, 4 November 2015
- Interview with former Director of the Office of Transition Initiatives - USAID, Abidjan, 5 November 2015
- Interview with Michel Gbagbo, Abidjan, 5 November 2015
- Interview with Mohamed Suma, Country Director - International Center for Transitional Justice, Abidjan, 9 November 2015 and 18 January 2017

- Interview with Sindou Bamba, President of national human rights organisation RAIDH, Abidjan, 9 November 2015
- Interview with former staff member of the Commission on Dialogue, Truth, and Reconciliation, Abidjan, 11 November 2015 and 30 November 2015
- Interview with former staff member of the Commission on Dialogue, Truth, and Reconciliation, Abidjan, 11 November 2015 and 2 December 2015
- Interview with Rodrigue Ange Dadjé, lawyer for Simone Gbagbo and Michel Gbagbo, Abidjan, 13 November 2015 and 1 February 2017
- Interview with Fahiraman Rodrigue Koné, former Program Officer on Transitional Justice - Freedom House, Abidjan, 16 November 2015
- Interview with Adjoumani Pierre Kouamé, president of human rights organisation LIDHO, Abidjan, 17 November 2015
- Interview with Professor Séry Bailly, Spokesperson of the Dialogue, Truth, and Reconciliation Commission, Abidjan, 17 November 2015
- Interview with expert on Disarmament, Demobilisation, and Reintegration for the Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ), Abidjan, 21 November 2015
- Interview with Human Rights Officer, Transitional Justice Unit – UNOCI, Abidjan, 24 November 2015
- Interview with Hervey Delmas Kokou, Executive Director of Amnesty International – Côte d'Ivoire section, Abidjan, 25 November 2015
- Interview with a Chief of Staff to a Minister of State, Abidjan, 27 November 2015 and 8 December 2015
- Interview with an ambassador, Abidjan, 30 November 2015
- Interview with a diplomat, Abidjan, 1 December 2015 and 11 December 2015
- Interview with senior official in the Ministry of Justice, Abidjan, 1 December 2015
- Interview with Eric-Aimé Sémien, President of Organisation Ivoirienne pour les Droits de l'Homme, Abidjan, 3 December 2015

- Interview with member of the ICC Registry in Abidjan, Abidjan, 4 December 2015
- Interview with a civil servant in the justice sector, Abidjan, 7 December 2015
- Interview with journalist working for an international news agency based in Abidjan covering Côte d'Ivoire and Mali between 2012-2018, Abidjan, 8 December 2015
- Interview with Laurent Akoun, spokesperson for the unofficial branch of the FPI, Abidjan, 9 December 2015
- Interview with senior Legal Advisor – UNOCI, Abidjan, 9 December 2015
- Interview with senior official in an international organisation, Abidjan, 11 December 2015
- Interview with African Union Ambassador to Côte d'Ivoire, Josephine-Charlotte Mayuma Kala, Abidjan, 11 December 2015
- Interview with senior official of the Human Rights Division - UNOCI, Abidjan, 12 December 2015
- Interview with Habiba Touré, lawyer for Simone Gbagbo, Paris**,** 6 May 2016
- Interview with former Ambassador of France to Côte d'Ivoire Jean-Marc Simon, Paris, 25 May 2016
- Interview with former member of the French Ministry of Foreign Affairs Laurent Bigot, Paris, 25 May 2016
- Interview with expert on customary justice in Mali, The Hague, 20 September 2016
- Interview with two ICC officials, The Hague, 21 September 2016
- Interview with researcher for a human rights organisation, Paris, 23 November 2016
- Interview with member of the French Ministry of Defence, Paris, 25 November 2016
- Phone Interview with Political Affairs Advisor to the European Union Special Representative to the Sahel, 8 December 2016
- Interview with diplomat based in Bamako 2013-2016, 16 December 2016
- Interview with researcher for a human rights organisation, 30 December 2016

- Phone Interview with former Mali Country Director, Rule of Law Initiative - American Bar Association, 19 January 2017
- Interview with diplomat, Abidjan, 17 January 2017
- Interview with member of International Center for Transitional Justice, Abidjan, 20 January 2017
- Interview with journalist working for an international news agency based in Abidjan covering francophone West Africa between 2014-2017, Abidjan, 26 January 2017
- Phone Interview with Moctar Mariko, human rights lawyer and President of the Association Malienne des Droits de l'Homme (AMDH), 2 February 2017
- Phone Interview with former consultant on conflict resolution and transitional justice for the United Nations, 2 February 2017
- Interview with journalist working with an international news agency based in Mali between 2013-2015, Abidjan, 16 February 2017
- Interview with representative from ICC, Abidjan, 8 February 2017
- Interview with Communications Manager for Ivoire Justice, Abidjan, 11 February 2017
- Phone Interview with researcher for a human rights organisation, 3 August 2017
- Interview with former Prime Minister of Mali Cheikh Modibo Diarra, Paris, 11 September 2017
- Interview with former member of the Special Cell, 12 September 2017
- Phone Interview with a MINUSMA official, 22 September 2017
- Interview with a diplomat based in Bamako between 2014-2017, 4 January 2018
- Phone Interview with researcher for a human rights organisation, 5 April 2018
- Phone Interview with a Professor of Political Science and a former member of the UN Standby Team as a senior expert on mediation, 7 May 2018
- Interview with former ICC Prosecutor Luis Moreno-Ocampo, Oxford, 12 May 2018

- Phone Interview with former Special Advisor to the African Union High Representative to Mali and the Sahel, 25 May 2018
- Phone Interview with Professor of Law, former Chargé de Mission at the Ministry of Justice of Mali, and former Chief of Staff to the Prime Minister Modibo Keita, 28 June 2018
- Phone Interview with Malian magistrate, 15 August 2018
- Phone Interview with senior advisor to UN Special Representative of the Secretary-General Young Jin Choi, 27 August 2018
- Phone Interview with member of the UN mediation team - MINUSMA, 30 August 2018
- Phone Interview with human rights officer working on Mali - OHCHR, 2 September 2018

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